

A
T R E A T I S E
OF THE
P L E A S O F T H E C R O W N ;

O R,
A S Y S T E M
O F T H E
P R I N C I P A L M A T T E R S R E L A T I N G T O T H A T S U B J E C T ,
D I G E S T E D U N D E R P R O P E R H E A D S .

By W I L L I A M H A W K I N S ,
S E R J E A N T A T L A W .

T H E S E V E N T H E D I T I O N .

In which the Text is carefully collated with the original Work ; the marginal References corrected ; new References from the modern Reporters added ; a Variety of *Manuscript Cases* inserted ; and the whole enlarged by an Incorporation of the several Statutes upon Subjects of Criminal Law, to the THIRTY-FIFTH YEAR OF GEORGE THE THIRD. To which an Explanatory Preface is prefixed, and new and copious Indexes are subjoined.

By T H O M A S L E A C H , E s q .
O F T H E M I D D L E T E M P L E , B A R R I S T E R A T L A W .

V O L . I I I .

L O N D O N :

P R I N T E D F O R G . G . A N D J . R O B I N S O N , P A T E R N O S T E R - R O W ; A N D
J . B U T T E R W O R T H , F L E E T - S T R E E T .

1795.

NOR is my application to Your Lordship in behalf of a Common Law Treatise any way discouraged by Your LORDSHIP's removal to the station you at present adorn ; for though the public good, and His Majesty's service, have put you under a necessity of leaving the Common-Law Courts, yet nothing can ever make you cease from being the most assured Friend and Patron as well as the most exquisite Master of the Common Law. And the greatest lovers of it have the less regret for the loss of Your LORDSHIP's presence among them, from the honour the Law itself has received by Your LORDSHIP's

VOL. III. a advancement.

THE DEDICATION.

advancement, whereby the world has been effectually convinced, that nothing so much conduces to make a consummate Chancellor as the most perfect skill and experience in the Common Law.

It is with the utmost pleasure we observe Your LORDSHIP with so much steadiness adhere to those stated boundaries of property which our ancestors have always had in such high veneration, and which Your LORDSHIP never departs from but in such cases wherein evident Equity, Common Sense, and Natural Justice, undeniably point out an exception.

It is to Your LORDSHIP we are obliged for the removal of that vulgar prejudice, that the Rules of Law and Equity could not possibly be reconciled. As Your LORDSHIP had formerly convinced us, that there is nothing in the Common Law rightly understood, that is any way repugnant to Equity; you have now given us the like satisfaction, that there is no Rule of Equity skilfully applied, that in the least contradicts the true Reason of the Common Law.

I am,

MY LORD,

With the greatest Respect,

Your LORDSHIP's most dutiful,

and most obliged Servant,

WILLIAM HAWKINS.

A N

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A N A L Y S I S

O F

T H E S E C O N D B O O K

O F T H E

P L E A S O F T H E C R O W N

ALL courts of criminal jurisdiction are courts of record, ch. 1. sect. 14.

And derive their authority from the crown, ch. 1. sect. 1, &c.

The PRINCIPAL COURTS of this kind are,

1. The court of the lord high steward, ch. 2.
2. The court of king's bench, ch. 3.
3. The court of the constable and marshal, ch. 4.
4. The court of the justices of *oyer* and *terminer*, ch. 5.
5. The court of justices of *gaol-delivery*, ch. 6.
6. The court of the justices of *assize* and *nisi prius*, ch. 7.
7. The court of conservators of the peace, ch. 8.
8. The court of justices of the peace, ch. 8. *continued.*

9. The court of sessions, ch. 8. *continued.*

10. The court of the coroner, ch. 9.

11. The sheriff's tourn, ch. 10.

12. The court leet, ch. 11.

The first thing to be done in order to the bringing a criminal to justice is to *arrest* him.

ARRESTS are either without process from a court of record, or by virtue of such process.

And first, arrests without such process, are either,

1. By private persons, or,
2. By public officers.

Arrests of this kind by private persons are either,

1. Such as are commanded and enjoined by law, ch. 12. sect. 1 to 8.
2. Such

AN ANALYSIS OF BOOK II.

2. Such as are permitted by law, ch. 12. sect. 8 to 18.

3. Such as are awarded by law, ch. 12. sect. 22, &c.

Arrests of this kind by public officers, are either,

1. By watchmen, c. 13. f. 1 to 7.

2. By constables, c. 13. f. 7 to 12.

3. By bailiffs of towns, c. 13. f. 12.

4. By justices of peace, which are either,

1. By parol, c. 13. f. 14.

2. By warrant, c. 13. f. 15. to the end of the chapter.

Persons arrested are either to be,

1. Bailed, c. 15.

2. Committed, c. 16.

Persons may be criminal, in preventing the bringing of offenders to public justice, several ways.

1. Before any arrest made.

2. After an arrest.

Persons may be so guilty before any arrest made,

1. By opposing an arrest, c. 17. sect. 1.

2. By suffering a criminal to escape, c. 17. f. 2. 4.

3. By flying from an arrest, c. 17. f. 3. c. 49. f. 14, 15, 16.

Persons may be so guilty after an arrest, either in respect of an arrest of themselves or of others.

Their offence in respect of an arrest of themselves, if without force, is called an *escape*, c. 17. f. 5.

If with force, is called a *breach of prison*, c. 18.

Their offence in respect of the arrest of others, is either,

1. Without force, or,

2. With force.

Such offences without force come under the notion of *escapes*, and are either,

1. By officers (c. 19.) or,

2. By private persons, c. 20.

Such offences with force come under the notion of *rescous*, c. 21.

Secondly, arrests by process from a court of record may be made by virtue of two kinds of process.

1. Upon such as is awarded by the discretion of the Court upon a bare suggestion, or the knowledge of the justices.

2. Upon such as is awarded on an *appeal*, *indictment*, or *information*,

Process of the first kind is generally called an *attachment* (ch. 22).

AN ATTACHMENT lies either against,

1. The officers of the court, as,

1. Sheriffs and bailiffs, ch. 22. sect. 2 to 6.

2. Attornies, ch. 22. sect. 6 to 12.

3. Other officers of the court, ch. 22. sect. 12.

4. Jurors, ch. 22. sect. 14 to 25, or,

2. Against other, as,

1. Inferior judges, ch. 22. sect. 25 to 30.

2. Counsellors, ch. 22. sect. 30.

3. Gaolers, ch. 22. sect. 31.

4. Any other persons whatsoever, ch. 22. sect. 33.

Process on an *appeal*, *indictment*, or *information*, supposes such appeal, indictment, or information, to be first exhibited.

AN APPEAL is either,

1. By an innocent person, which may either be by writ or by bill, ch. 23.

2. By an offender confessing himself guilty, who is commonly called AN APPROVER, ch. 23.

ERRATA ET ADDENDA;

Page 38, line 41. instead of "2. Hen. 15. c. 4." read "2. Hen. 5. c. 4."

Page 177, after "24. Geo. 2. c. 44." in margin, add "Vide ante page 82. l. 86."

Page 179, in margin, instead of "Sess. 33, 34." read Sess. 57. 59. 63."

Page 185, last line dele "1. and 2. Philip and Mary, 15."

Page 251, instead of "Cb. 91," read "Cb. 19."

A
T R E A T I S E
O F
THE PLEAS OF THE CROWN,
BOOK THE SECOND.

CHAPTER THE FIRST.

O F C O U R T S
O F
C R I M I N A L J U R I S D I C T I O N .

HAVING, in the first book, endeavoured to shew the nature of criminal offences, I am now to shew, in what manner the offenders are to be brought to punishment.

In order hereto I shall consider the nature of the courts which have jurisdiction over such offences, and in what manner the offenders are to be proceeded against by such courts.

For the better understanding of the nature of such courts, I shall premise some considerations concerning them in general, and then consider the nature of the principal of them in particular.

As to the nature of such courts in general, I shall consider, What is requisite to the constitution of their authority, and what is incidental to all such courts in general.

Sec. 1. I shall take it for granted, That the king, being the supreme magistrate of the kingdom, and intrusted with the whole executive power of the law, no court whatsoever can have any such jurisdiction, unless it some way or other derive it from the crown.

S. P. C. 44, 11.
1. Roll. Ab.
361.

Dalt. c. 1.
S. P. C. 54.
4. Inst. 71.
2. R. 3. 11.
Speed 521.
524.
1. R. Ab. 535.
12. Co. 64.
Dyer 187.

Seet. 2. Yet it seems that the king himself cannot sit in judgment upon any indictment, because he is one of the parties to the suit; and therefore where it is said, in some of our ancient histories, that our kings have sometimes sat in person, with the justices, at the arraignment of great offenders, probably it ought not to be intended that they came as judges, but as spectators only, for the greater solemnity of the proceeding.

(a) 4. Inst. 70.
71. 103. c
8. H. 4. 13.
2. R. 3. 11.

Seet. 3. It is said by *Sir Edward Coke (a)*, that the king has committed and distributed all his power of judicature to several courts of justice; and though it may be argued, with the highest probability, both from the nature of the thing, and the constant tenor of our ancient records and histories since the conquest (*b*), and also from the form of all process in the king's bench and chancery, which is always made returnable before the king himself (*c*), that in old time our kings in person often determined causes between party and party, proper for those courts; yet at this day, by the long, constant, and uninterrupted usage of many ages, our kings seem to have delegated their whole judicial power to the judges of their several courts (*d*), which by the same immemorial usage have gained a known and stated jurisdiction, regulated by certain and established rules, which our kings themselves cannot alter without an act of parliament.

(b) Madox 5.
to 17. and 56.
to 85.
Dalt. c. 1.
(c) 28. Aff.
52.

(d) 4. Inst. 73.
1. Comm. 268.

6. H. 7. 4.
B. Pat. 53.
4. Inst. 125.
127.
6. Co. 11.
2. Hale 105.
Skin. 273.
4. Term Rep.
111.

Seet. 4. For it seems to be clearly agreed, that the king cannot give any addition of jurisdiction to an ancient court, but that all such courts must be holden in such manner, and proceed by such rules and in such cases only, as their known usage has limited and prescribed; and from hence it followeth, that as the court of king's bench cannot be authorised to determine a mere real action between subject and subject, so neither can the court of common pleas to inquire of felony or treason.

4. Inst. 87.
1. Sid. 338.
The king cannot grant a mere spiritual jurisdiction,
as to ordain, institute, &c. to a lay person, nor can he exercise them himself; but must administer those laws by bishops, as he does the common law by judges. Cro.
Eliz. 259. 314.

Seet. 5. Nay, it is said by some, that the king is so far restrained by the ancient forms in all cases of this nature, that his grant of a judicial office for life, which has been accustomed to be granted only at will, is void.

42. Aff. 12, 13.
4. Inst. 164.
B. Commis.
15.
F. N. B. 110.
B. Indict. 22.
38. 12. Co. 31.

Seet. 6. And the law is so jealous of any kind of innovation in a matter so highly concerning the safety of the subject, as not to endure any the least deviation from the old known stated forms, however immaterial it may seem; as will be more fully shewn in chapter the fifth, sect. 2.

Seet.

Sec. 7. From the like reason it follows, that commissions to seize the goods and imprison the bodies of all persons who shall be notoriously suspected of felonies or trespasses, without any indictment or other legal process against them, are illegal and void (*a*).

Case of General Warrants,

Sec. 8. And it is said, that the king cannot grant any new commission whatsoever that is not warranted by ancient precedents, however necessary it may seem, and conducive to the public good; and therefore (*b*) commissions to assay weights and measures, being of a new invention, were condemned by parliament. And it is said by (*c*) *Sir Edward Coke*, that the king could not authorize persons to take care of rivers and the fishery therein, according to the method prescribed by the statute of Westminster the Second, c. 47. before the making of that statute.

Sec. 9. As all judges must derive their authority from the crown by some commission warranted by law, they must also exercise it in a legal manner, and hold their courts in their proper persons; for they cannot act by (*d*) deputy, nor any way transfer their power to another, as the (*e*) judges of ecclesiastical courts may.

Sec. 10. (*f*) But it seems, that regularly where there are divers judges of a court of record, the act of any one of them is effectual, especially if their (*d*) commission do not expressly require more.

39. H. 6. 41. S. P. C. 53. Con. Dalif. 24. Hob. 70. 2. R. Ab. 673. Crom. 121. (*d*) 27. Aff. 23. 2. R. Abr. 677.

Sec. 11. It hath been (*g*) resolved, that by the common law all patents of the justices of either bench, barons of the exchequer, sheriffs, escheators, commissioners of oyer and terminer, gaol-delivery, and of the peace, are determined by the death of the king who made them. Also it seems (*h*) certain, that at the common law (before 1. Edw. 6. c. 7. set forth more at large ch. 6.) if one had been convicted of any offence before any such commissioners, and the king had died before judgment, no judgment at all could have been given, because the king was dead for whom the judgment was to have been given, and because the authority of the judges was determined. Also it is said, that at (*i*) common law a person attainted in the time of a former king, could not have been executed without a new warrant. Yet it hath been adjudged, that the authority of (*k*) a coroner or verderor

Crom. Jur. 126. Qu. 4. E. 4. 44. B. Officer, 25. denied in S. P. C. 49.

(a) 7. Co. 30. ceases not by the demise of the king in whose reign they were chosen; and that the office of a (a) sheriff, in such places where he is chosen by a corporation having by its charter the inheritance of the office, does not determine by the demise of the king; from whence it seems also to follow, that no other corporation officer, who by the charter is invested with any judicial authority, loses it by such demise.

L. Raym. 747. *Sec. 12.* And to prevent the disorders and other inconveniencies which may happen upon the death of a king, from the want of persons armed with competent authority to execute the laws, before the successor can have time to appoint others, it was enacted by 7. & 8. Will. 3. c. 27. s. 21. "That no commission, either civil or military, shall cease, determine, or be void, by reason of the death and demise of his said majesty, or of any of his heirs or successors, kings or queens of this realm; but that every such commission shall be, continue, and remain in full force and virtue, for the space of six months next after any such death or demise, unless in the mean time superseded, determined, or made void by the next and immediate successor, to whom the imperial crown of this realm, according to the act of settlement in the said statute before mentioned, is limited and appointed to go, remain, or descend."

Sec. 13. And by 1. Ann. stat. 1. c. 8. s. 2. "No patent or grant of any office or employment, either civil or military, hereafter to be made, shall cease, determine, or be void, by reason of the death or demise of any king or queen of this realm; but every such patent or grant shall be, continue, and remain in full force for six months next after any such death or demise, unless in the mean time superseded, determined, or made void by the next immediate successor, to whom the crown is limited and appointed to go, remain, or descend."

The proceedings on an information in the nature of *quo warranto* are not abated by the demise of the crown, *Stra.* 782; but the king's writ of error in a *qua et impledit* abates by his death.

Stra. 841. (b) Held to extend to a *scire facias*, brought for the repeal of letters patent. *Lutw.* 353.

By 1. Ann. st. 1. c. 8. s. 5. "No commission of assize,oyer and terminer, general gaol-delivery, or of association, writ of admittance, writ of *fi non omnes*, writ of assistance, or commission of the peace, shall be determined by the death of any king or queen of this realm; but every such commission and writ shall be and continue in full force for six months next ensuing, notwithstanding such demise, unless superseded and determined by the next successor: And also no original writ, (b) writ of *ni si prius*, commission, process, or proceedings whatsoever, in, or issuing out of, any court of equity, nor any process

" or proceedings upon any office or inquisition, nor any writ of *certiorari*, or *habeas corpus*, in any matter or cause, either criminal or civil, nor any writ of attachment or process for contempt, &c. shall be determined, abated, or discontinued, by the demise of any king or queen of this realm; but every such writ, &c. shall remain in full force, to be proceeded upon, as if such king or queen had lived."

† Also by 12. & 13. Will. 3. c. 2. (which limits the crown to the princess Sophia) it is enacted, " That after the said limitation shall take effect in the manner mentioned in the act, judges commissions shall be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them."

Originally judges were appointed *durante bene placito*, 4. Inst. 75.

† And for the purpose of rendering more effectual the provisions of the above statute, it is enacted by 1. Geo. 3. c. 23. " That the commissions of judges for the time being shall be, continue, and remain in full force, during their good behaviour, notwithstanding the demise of his majesty, or of any of his heirs and successors.—Provided always, that it may be lawful to remove any judge or judges upon the address of both houses of parliament."

This act was passed at the earnest recommendation of the king himself from the throne, declaring that he considered the independence of the

judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown. Commons Journals, 3d March 1761.

† It is also further enacted by the above statute, par. 3. " That such salaries as are settled upon judges for the time being, or any of them, by act of parliament; and also such salaries as have been or shall be granted by his majesty, his heirs and successors, to any judge or judges, shall in all time coming be paid and payable to every such judge and judges for the time being, so long as the patents or commissions of them, or any of them respectively, shall continue and remain in force.—Also, such salaries of the judges as are now, or shall be charged upon and paid out of the duties and revenues granted for the uses of the civil government."

Vide 32. Geo. 2. c. 35. an augmentation to their salaries. Also 2. Geo. 3. c. 4. the 5. Geo. 3. c. 47. and 19. Geo. 3. c. 65.

As to what is incidental to all such courts in general, I shall only take notice of the following particulars:

SECT. 14. FIRST, That all courts of this kind must be courts of (a) record; for a court which is not of record (a) 2. Inst. 311. Farref. 128. Reg. 111. F. N. B. 85. 16. 239. 1. R. Abr. 543. Co. Lit. 117. 2. Lev. 93. 1. Mod. 215. 3. Lev. 205. 8. Co. 38.

cannot impose any fine on an offender, nor award a *capias* against him, nor even hold plea of a common trespass *vi et armis*. From hence it clearly follows, That no proceedings of any court of criminal jurisdiction can be removed into a superior, but by writ of error, or *certiorari*; and that no averment can be taken against the truth of any thing recorded in any such court (a); and that all courts of common law that have power given them to fine and imprison, are thereby made courts of record.

(a) Salk. 200.

(b) 11. H. 6.

12.
1. R. Abr. 219.
8. Co. 38.
11. Co. 43.
C. Eliz. 581.
1. Sid. 145.
B. Leet 2. 36.

SECT. 15. SECONDLY, That (b) all such courts may enjoin the people to keep silence under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court; and it is said, that all such courts, except the court-leet, may also imprison all such offenders. Also it seems (c), That even a court-leet is so far intrusted with the keeping of the peace within its own precinct, that the steward of it may by recognizance bind any person to the peace, who shall make an affray in his presence, sitting the court, or may commit him to ward, either for want of sureties, or by way of punishment, without demanding any sureties of him; in which case he may afterwards impose a fine according to his discretion; from whence it follows *à fortiori*, that other superior courts of record have the like power.

(c) F. N. B.

82.
Dalt. c. 1.
Lamb. c. 3.
10. H. 6. 10.
Crom. 7.
11. Co. 43.
seems con.

1. H. 7. 26.
3. Inst. 29.

SECT. 16. THIRDLY, That no judge of any such court is compellable to deliver his opinion before-hand, in relation to any question which may after come judicially before him.

27. Aff. 23.
2. R. Ab. 77.
B. Indict. 17.
Cromp. 121.
122.
Salk. 201.

SECT. 17. That no such judge is any way punishable for a mere error of judgment, as hath been more fully shewn in the first book, chap. 17. sect. 6.

Lamb. 403.
Qu. 1. Keb.
845.
1. Lev. 159.
1. Brown 15.
Raym. 100.
B. Priv. 35.
Crom. 180.

SECT. 18. It is questioned, whether all courts of record may not discharge any person arrested during his journeying to or from such courts, or necessary attendance there, by process from any other court: however, it seems to be agreed, that any such court may discharge a person who shall be so arrested in the face of it (a).

Gillb. Cas. 308. 2. Stra. 987. 6. Mod. 66. 10. Mod. 333. 1. Bar. K. B. 251. Cooke's Bank. Laws, 291. 2. Black. 1113. 1. Black. 410. (a) But this privilege does not extend to capital crimes, and therefore a defendant may, on appearing on a recognizance, be arrested on a new warrant for treasonable practices, Rex v. Kelly, Stra. 530.

CHAPTER THE SECOND.
OF
THE COURT
OF
THE HIGH STEWARD OF ENGLAND.

AND now I am to consider the nature of the principal courts of criminal jurisdiction in particular.

13. H. 8. 11.
Prynne on the
4. Institutes,
46.

FIRST, The court of the high steward of England.

SECONDLY, The court of king's bench.

THIRDLY, The court of the constable and marshal.

FOURTHLY, The court of the justices of oyer and terminer.

FIFTHLY, The court of the justices of gaol-delivery.

SIXTHLY, The court of the justices of assize and *nisi prius*.

SEVENTHLY, The court of conservators ; justices of the peace ; and the sessions.

EIGHTHLY, The court of the coroners.

NINTHLY, The sheriff's tourn.

TENTHLY, The court leet.

SECT. I. The office of HIGH STEWARD OF ENGLAND was anciently hereditary, not having been granted to any one since the reign of king *Henry the Fourth* but only *pro hac vice*, either for the trial of A PEER on an indictment for a capital offence, or for the determination of the pretensions of those who claim to hold by GRAND SERJEANTY, to do certain honourable services to the king at his coronation.

4. Inst. 58, 59.
Madox 33.
1. Comm. 269.
4. Comm. 259.
Barr. 234.
Kely. 56.
Crom. of
Courts 84.
Fleta, l. 2. C.

It seems needless to make a particular inquiry concerning the authority of the court of this high officer, of which very little mention is made in our ancient records or law books ; and therefore I shall content myself with remarking, in this place,

2. 3.
1. Hale 7.
1. Hale 350.
Foster 142.
Lords Journ.
12th May
1679.

Com. Journ.
15th May
1679.
3. Inst. 28.
13. H. 8. 11.
4. Inst. 59.
S. P. C. 152.
Post. ch. 44.

place, in general, that anciently the duty of this office consisted in supervising and regulating, next under the king, the administration of justice, and all other affairs of the realm, whether civil or military, and that no one under the degree of nobility is capable of so honourable a post; and for the particular manner of executing this office in the trial of a peer, I shall refer the reader to the chapter concerning the trial of peers.

THERE are two distinct and independent courts in which a lord high steward is occasionally appointed to preside. First, the court of the lord high steward. Secondly, the court of our lord the king in parliament. The first court is instituted, by commission, for the trial of peers indicted for treason, felony, or misprision thereof during the recess of parliament; in which the high steward sits as sole judge in matters of law; and the lords triors as judges in matters of fact. They cannot, therefore, interfere with him in regulating the modes of proceeding, nor ought he to intermix with them upon the decision of facts. Foster 233. 4. Comm. 260.—The second court is the house of peers acting in its judicial capacity; founded in immemorial usage and the law and custom of parliament: and all proceedings, whether upon a writ of error, impeachment, or indictment removed by *certiorari*, are in contemplation of law proceedings before the king. In the trial of a peer, indeed, for a capital offence, it hath been usual to appoint a lord high steward during the trial, and until judgment is given, for the sake of order, regularity, and dignity; but this appointment does not alter the nature and constitution of the court: and in this court every temporal peer hath a right to be present during every part of the proceeding, and to vote upon every question both of law and fact; the decision of which is guided by the majority, and in which decision the lord high steward mixes merely as a peer, and in no other right. Foster 141, 142, 143.

CHAPTER THE THIRD.

OF
THE COURT
OF
KING'S BENCH.

THE whole jurisdiction which is now distributed among the several courts of *Westminster-Hall*, seems, in the first reigns after the conquest, to have been lodged in one court, commonly called THE KING'S COURT, wherein justice is said to have been administered sometimes by the king himself in person, and sometimes by the high justiciar, who was an officer of very great authority, and used, in the king's absence beyond sea, to govern the realm as vice-roy.

Ante 2.
Madox 19. 21.
135.
2. Hale 6
1. R. A. 94, 95.
2. Inst. 24.
Vide Introduction to
Crompt. 3. 2d. 8.
passim.

3. Comm. 41. 4. Comm. 262. Reeves Hist. E. L.

SECT. 2. Out of this court the courts of Common Pleas and Exchequer seem to have been derived, some time before the making of the statute of MAGNA CHARTA; the former of which courts properly determines pleas merely civil, and the latter those relating to the revenue of the crown. After the erection of these courts, the supreme court seems, by degrees, to have obtained the name of The Court of King's Bench, and hath always retained a supreme jurisdiction in all criminal matters, and also in certain personal causes, and is still supposed to have always the king himself in person sitting in it.

Madox 543.
Co. Lit. 71.
2. Inst. 21, 22.
Dyer 187.
Crompt. C. 78.
12. Co. 64.

For the better understanding the nature of this court, I shall consider the following particulars:—FIRST, In what manner it corrects all kinds of misdemeanors of all persons in general.—SECONDLY, How far it reforms inferior courts.—THIRDLY, How far its presence suspends the power of all other courts.—FOURTHLY, What rules are to be observed in the form of its proceedings.

SECT. 3. AS TO THE FIRST POINT, It is certain, that this court is intrusted with the highest jurisdiction, not only over all capital offences, but also all other misdemeanors whatsoever of a public nature, tending either to a breach of the peace, or to the oppression of the subject, or to the raising of faction, controversy, or debate, or to any manner of misgovernment; so that whatsoever crime is manifestly against the publick good, it comes within the consueance of this court, though it do not directly injure any particular person,

2. Hale c. 5.
13.
11. Co. 98.
Ray. 103.
1. Roll. 225.
4. Inst. 71.
1. Sid. 211.
4. Comm. 262.

son; neither can any private subject, who has not forfeited his right to the protection of the law, suffer any kind of unlawful violence or gross injustice against his person, liberty, or possessions, from any person whatsoever, without a proper remedy from this court, not only for satisfaction of the private damage, but also for the exemplary punishment of the offender.

1. Sid. 168.

3. Russ. S. 133.

Señ. 4. Neither is it necessary in a prosecution of any such offence in this court, to shew a precedent of the like crime formerly punished here, agreeing with the present in all its circumstances; for this court being the *custos morum* of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the publick, if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it.

So they may direct their warrant to all the constables of England,

The King *v.* White, B. R. H. 37. Moor 666. 1. Sid. 145.

Dalif. 25.

Carth. 6.

2. Hale 3.

1. Mod. 35.

44. E. 3. 31.

Crompt. Jur.

131.

Señ. 6. Also this court hath such a sovereign jurisdiction in criminal matters, that it may proceed as well on indictments found before other courts, and removed into this by *certiorari*, as on indictments or informations originally commenced in it, whether the courts before whom such indictments were found be determined, or suspended, or still *in esse*, and whether the proceedings be grounded on the common law, or on some statute making a new law concerning an *old offence*, and appointing certain justices to execute it, as the statutes of (a) forcible entries, and the (b) statute of Philip and Mary against persons taking away females under the age of sixteen years from their (c) guardians, &c. Neither doth a statute which appoints, That all crimes of a certain denomination shall be tried before certain judges, exclude the jurisdiction of this court, without express negative words; upon which ground it has been resolved, That (d) 33. Hen. 8. c. 12. which enacts, That all "treas-

(a) 9. Co. 118.

B. 1. c. 46.

S. 51.

(b) C. Car.

465.

1. Lev. 179.

2. Mod. 128.

129, 130.

(c) 3. Keb. 75.

94. 106. 273.

(d) 2. Inst. 549. 2. Jones 53.

1. Mod. 45.

Burr. 1042.

1. Vent. 66.

Strange 303.

2. Hale 59.

10. Rep. 73.

11. Rep. 64.

1. Rol. 92.

"sons,

"sons, &c. within the king's house shall be determined before the lord steward of the king's house, &c." does not restrain this court from proceeding against such offences. But where a statute creates a (*a*) new offence, which was not taken notice of by the common law, and erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it seems questionable, how far this court has an implied jurisdiction in such a case.

(*a*) 1. Sid. 296.
2. Hale 5.
Cro. Jac. 643.
See Rex v.
Harris,
4. Term Rep.
202.

Sec. 7. But it is certain, that the law has so high a regard to this court, that it will not suffer a (*b*) record regularly removed into it from an inferior one, to be remanded (*c*) after the term in which it came in (except in some few (*d*) special cases); yet if the justices perceive, that there is any practice in endeavouring to remove any such record, or that the sole intention of such removal is the delay of justice, they may on their discretion refuse to receive such record, and may before it is filed remand it back again, for the expedition of justice; and upon this (*e*) ground, as I suppose, where one (who had pleaded *not guilty* to an appeal below, and at his trial had challenged for many of his jury that the inquest could not be taken for want of jurors, whereupon a new *distingas* was awarded) removed himself into the court of King's Bench, he was ordered to be remanded. Also by the construction of the statutes which empower the common-law courts of Westminster to grant a (*f*) *nisi prius* for the trial of issues joined in those courts, the justices of the King's Bench may grant such trial, as well in cases of treason and felony as in other common cases; because, for such trial, not the record itself is sent down, but only the transcript of it (*g*).

(*b*) 22. E. 3. 6.
2. Hale 3.
29. Aff. 43.
40. Aff. 29.
1. R. Ab. 534.
492.
4. Inst. 73.
S. P. C. 158.
(*c*) 1. Rol. 8.
(*d*) C. Car.
29.
1. Saund. 97.
99.
1. Lev. 223.
1. Sid. 329.
(*e*) 4. Inst. 74.
75.
Strange 440.
5. Com. Dig.
397.
16. E. 4. 5.
B. Com. 162.
231.
(*f*) 4. Inst. 74.
Ray. 364.
(*g*) Cowp. 842.

Sec. 8. And by 6. Hen. 8. c. 6. it is recited, "That divers felons and murderers, upon feigned and untrue surmises, had oftentimes removed as well their bodies as their indictments, by writ and otherwise, before the king in his bench, and could not by the order of the law be remitted and sent down to the justices of gaol delivery, or of the peace, nor other justices, nor commissioners, to proceed upon them after the course of the common law:" and thereupon it is enacted, "That the justices of the King's Bench have full authority by their discretions, to remand and send down as well the bodies of all felons and murderers, brought or removed before the king in his bench, as their indictments, into the counties where the same murders or felonies have been committed and done; and to command all justices of gaol delivery, justices of peace, and all other justices and commissioners, and every of them, to proceed and determine upon all the aforesaid bodies

Crom. Jur.
213.
2. Hale 3, 4.
41.

"bodies and indictments so removed, after the course of the common law, in such manner as the same justices of gaol delivery, justices of peace, and other commissioners, or any of them, might or should have done, if the said prisoners or indictments had never been brought into the said King's Bench."

Ray. 367.

Seft. 9. In the construction of this statute it seems to have been holden, That it shall not be extended by equity to High Treason.

Sayer 26, 217.
243. 267.
1. Salk. 396.
Burr. 556.
785. 1162.
Loft. 55.
Rex v. Jackson, Term
Rep. 653.

Seft. 10. As to THE SECOND POINT, viz. How far the court of King's Bench reforms inferior courts—There is no doubt but that this court, being the highest court of common law, hath not only power to reverse erroneous judgments given by inferior courts, but also to punish all inferior magistrates, and all officers of justice, for all wilful and corrupt abuses of their authority, against the known, obvious, and common principles of natural justice, but not for mere mistakes, which an honest well-meaning man may innocently fall into.

(a) Sum. 156.
2. Hale C. 4.
9. Co. 118.
27. Aff. 1.
3. Inst. 27.
4. Inst. 73.
(b) 21. H. 7.
29.
B. Commis. 10.
Port 16.
(c) Inst. 73.
(d) 4. Inst. 73.
Dy. 286.

(e) Kailw.
152.

Seft. 11. As to the THIRD POINT, viz. How far the presence of this court suspends the power of all other courts—It is certain, that this being the (a) supreme court of *oyer and terminer*, gaol-delivery, and *eyre*, doth so far suspend the power of all other justices of this kind, in the county wherein it sits, during the time of its sitting in it (if such justices have (b) notice of its sitting there, and even without such notice (c). as some say), that all proceedings commenced before any such justices during such time are void. Yet it (d) seems, that such justices may proceed upon indictments taken in a foreign county and removed before them, because the court of King's Bench have nothing to do with such indictments unless they be removed into it. Also there seems to be the same reason, that such justices may proceed upon indictments taken before them of offences in the same county before the term; for it is said in *Kailway* (e), that if an appeal be commenced before justices in *eyre*, and afterwards another appeal be brought in the King's Bench, it will be a good plea, that another appeal is depending; which shews that the King's Bench ought not without a *certiorari*, &c. to intermeddle in an appeal whereof another court is legally possessed before; and the reason seems to be the same as to indictments: and it is said in the same book, That if the King's Bench and justices in *eyre* are in one county, yet this shall not change the power of the justices in *eyre*, but that if the king will make process for any thing not commenced before the justices of *eyre*,

as to such thing their power is ceased; by which it seems to be implied, that as to what was commenced before them, their power continues: However, it is certainly the safest way for any of the justices abovementioned proceeding on any such indictment, to have a special commission for that purpose, and it is most advisable that such commission bear *teste* in the term.

3. Inst. 24.
4. Inst. 73.
Sum. 156,
157.

Sett. 12. But it is enacted by 25. Geo. 3. c. 18. "That when any session of oyer and terminer and gaol delivery of NEWGATE, in the county of *Middlesex*, shall have been begun to be holden before the *essoin day* of any term, the same session shall and may be continued to be holden, and the business thereof finally concluded, notwithstanding the happening of such *essoin day* of any term, or the sitting of the said court of *King's Bench* at *Westminster*, or elsewhere in the said county of *Middlesex*, and that all trials, judgments, proceedings, acts, deeds, matters, and things whatsoever, and all proceedings, acts, deeds, matters, and things in pursuance of such judgments had, made, and done at such session, so continued to be holden after the *essoin day* of any term, or the sitting of the said court of *King's Bench* at *Westminster*, or elsewhere in the county of *Middlesex*, shall be good, valid, and effectual in law, and deemed, reputed, and taken to be so, to all intents and purposes whatsoever."

The gaol delivery of *Newgate* shall not be suspended by the sitting of the *King's Bench*, &c.

Sett. 13. And by the 32. Geo. 3. c. 48, "the justices of the peace for the county of *Middlesex* are enabled to continue a session of the peace, and of oyer and terminer, begun to be holden before the *essoin day* of term and sitting of the *King's Bench* at *Westminster*, notwithstanding the happening of such *essoin day*, or the sitting of the said court of *King's Bench* at *Westminster* or elsewhere in the county of *Middlesex*."

Sett. 14. As to the FOURTH POINT, viz. What rules are to be observed in the form of the proceedings of this court—It seemeth that all process upon (a) writs of appeal, and also all process upon (b) indictments removed hither by *certiorari* from a foreign county, ought to be made returnable *coram nobis ubicunque fuerimus*; but that all process upon (c) bills of appeal against one in *custodiâ marescalli*, and perhaps also upon (d) indictments commenced in the *King's Bench*, ought to be returnable *coram nobis apud Westmonasterium*. Also it has been (e) resolved, That where the court proceeds on an offence committed in the same county wherein it sits, the process may be made returnable immediately;

(a) Co. Ent. 57, 53. 60.
(b) Co. Ent. 354, 355, 356, 358.
(c) Co. Ent. 52, 58. 60.
(d) Co. Ent. 352, 353, 361, 360, 363.
(e) 9. Co. 118. Co. Lit. 134.

1. Lev. 61. 1. Sid. 72. 2. R. Abr. 629. 4, 5. 2. Inst. 559, 563.

but

but that where it proceeds on an offence removed by *certiorari* from another, there must be fifteen days between the *teste* and return of every process.

THE JUSTICES of this court are the sovereign judges of gaol delivery and of oyer and terminer, 9. Cð. 118. and therefore, where proceedings are limited to justices of oyer and terminer, the court of King's Bench has an implied jurisdiction, 2. Hale 4. They are also conservators of the peace, 4. Inst. 73. throughout the whole realm, 2. Rol. Abr. 558. and supreme coroners of all England, 4. Co. 57.; and therefore, where the sheriff or coroners may receive appeals by bill, this court may, *à fortiori*, do the same, 4. Inst. 73. 4. Co. 57. This court during the term, and any judge thereof during vacation, may admit persons committed for any crime to bail, according to their discretion, Skin. 683. Salk. 105. Strange 911. 1. Com. Digest. 497. be it treason, murder, or any other offence, 2. Inst. 189. Latch. 12. Vaughan 157. Comb. 111. 298. 1. Com. Digest. 495. except persons committed by either house of parliament during the sessions, Wilson 299. and persons committed for contempts by any of the king's supreme courts of justice, 4. Comm. 300. Also where the body of an offender attainted in the country is removed by *habeas corpus*, and the record by *certiorari*, into this court, it may award execution, Cro. Con. 176. to be done by the marshal, 2. Hale 5. or it may issue a mandate to the sheriff to perform it as the marshal's assistant, 1. Hale 464. And where persons put in feigned bail, so as not to be reached by 21. Jac. 1. this court may order all the parties concerned to be set in the pillory, Strange 384. This court also has power to compel the production of examinations, papers, books, &c. and to do whatever may be necessary to the attainment of justice, Strange 384. 954. So also it may order one not a party to attend the master, Strange

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p

CHAP.

CHAPTER THE FOURTH.
OF
THE COURT
OF
THE CONSTABLE AND MARSHAL.

FOR the better understanding the nature of this court, it may not be improper to premise some general considerations concerning the ancient jurisdiction of those high officers before whom it is holden. 2. Com. Digest 599.

SECT. 1. As to the office of HIGH CONSTABLE OF ENGLAND, which anciently was hereditary, the same being esteemed of too high authority to be safely intrusted with any subject but only *pro hac vice*, since the reign of king Henry the Eighth; and there being very little to be found in our ancient records and histories concerning the particular power or authority of this high office, our most learned antiquaries seem to be able to give us little more than their own conjectures concerning this matter. However, there is no doubt but that he was an officer of very great power both in war and peace; and indeed his very name imports no less; for the word "Constable" signifying in general a commander or officer, he who was called CONSTABLE OF ENGLAND, or *the king's constable*, or sometimes by the way of eminency *the constable*, without any other addition, cannot but be thought to have been a person of the highest command and authority; and the statute of 13. Rich. 2. (which is at large set forth in the following part of this chapter) restraining his jurisdiction to things touching war not determinable by the common law, in relation to which it requires him to proceed according to ancient usage, clearly supposes him to have an ancient established authority concerning these matters: and it seems to have been somewhat doubtful, before the making of the said statute, whether *the constable* and *the marshal* had not a general jurisdiction over all contracts whatsoever made beyond sea. Dyer, 285.
4. Inst. 127.
Farresley 125.
Spel. Gloss.
146.
Madox 27, 28,
29.
48. E. 3. 3.
13. H. 4. 4, 5.

SECT. 2. Neither do there seem to be any greater footsteps in antiquity of the original institution of the office of THE LORD MARSHAL, or of his power or authority; for anciently there were several officers of the king's household who were called marshals, as the marshals of his horses, of his birds (a), and of his measures, who had certain salaries allotted them for the management or well-ordering of the things committed (a) Madox 30.

committed to their charge. And in the ancient records relating to those officers, there seems no more to be meant by having the marshalship of a thing, than to have the oversight or charge, or ordering of it: also in our old records, there are some officers taken notice of by the name of marshals, who are mentioned only in general to have been servants of the king's household, without any farther account of the nature of their office or duty in particular. However, we find

Madox 30. 31. that in the twenty-second year of king *Edward the third*, the parliament granted fifteenths on divers conditions, one of which was, that there shall be no marshalship in *England* except the marshalship of the king, and of the guardian of *England*, when the king shall be out of *England*. And it seems clear, that there was one marshal superior to the rest, who was sometimes called the master-marshal, at other times the king's marshal, the marshal of *England*, or the earl marshal, being an officer of very great authority both in

Madox 20. 30. war and peace, whose principal office in time of war (*a*) was
a. R. Ab. 527. to regulate the incampments of the army, and to assign to the troops their respective posts in the day of battle; and in

Madox 31, 32, time of peace (*b*) to provide for the security of the king's
 33. person in his palace, to distribute the lodgings there, and to
 (a) *Fleta L. 2.* preserve peace and order in the king's household, and to be
c. 4. assistant to the constable in determining causes, and also to
Co. Lit. 74. execute the (*c*) orders both of the court of the constable, wherein he himself sat as judge, and of the court of the high
 (b) **Madox 33.** steward (*d*), to which he seems to have been only an officer.
 (c) *4. Inft.*
 223.
Cal. in Parl.
 60.
 (d) *Fleta L. 2.*
C. 37.

Madox 29. *Sec. 3.* But whatever might be the original institution of these officers, or the nature of their authority, it is certain their jurisdiction is at present declared, limited and restrained by certain acts of parliament, before the making whereof we have scarce any thing memorable on record concerning this matter.

Sec. 4. AND FIRST by 8. Rich. 2. c. 5. "Because divers pleas concerning the common law, and which by the common law ought to be examined and discussed, are of late drawn before the constable and marshal of *England*, to the great damage and disquietness of the people:" It is agreed and ordained, "That all pleas and suits touching the common law, and which ought to be examined and discussed at the common law, shall not hereafter be drawn or holden by any means before the aforesaid constable and marshal, but that the court of the same constable and marshal shall have that which belongeth to the same court, and that the common law shall be executed and used, and have that which to it belongeth, and the same shall be executed and used, as it was accustomed to be used in the time of king Edward."

Scots

Stat. 5. And it is farther declared by 13. Rich. 2. c. 2. in the following words: "Because that the commons do make a grievous complaint, that the court of the constable and marshal hath incroached to him, and daily doth incroach, contracts, covenants, trespasses, debts, and detinues, and many other actions pleadable at the common law in great prejudice of the king, and of his courts, and to the great grievance and oppression of the people: Our lord the king willing to ordain a remedy against the prejudices and grievances aforesaid, hath declared in this parliament, by the advice and assent of the lords spiritual and temporal, the power and jurisdiction of the said constable, in the form that followeth: "To the constable it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm which cannot be determined nor discussed by the common law, with other usages and customs to the same matters pertaining, which other constables heretofore have duly and reasonably used in their time; joining to the same, that every plaintiff shall declare plainly his matter in his petition, before that any man be sent for to answer thereunto. And if any will complain that any plea be commenced before the constable and marshal that might be tried by the common law of the land, the same plaintiff shall have a privy seal of the king without difficulty, directed to the said constable and marshal, to sur-
 "cease in that plea until it be discussed by the king's council, if that matter ought of right to pertain to that court, or otherwise to be tried by the common law of the realm of England, and also that they surcease in the mean time."

Co. Lit. 391
4. Inst. 193.

1. Show. 353.

Stat. 6. And it is farther enacted by 1. Hen. 4. c. 14. as followeth: "For many great inconveniencies and mischiefs that often have happened by many appeals made within the realm of England before this time," it is ordained and established from henceforth, "That all the appeals to be made of things done within the realm, shall be tried and determined by the good laws of the realm, made and used in the time of the king's noble progenitors; and that all the appeals to be made of things done out of the realm, shall be tried and determined before the constable and marshal of England for the time being: and moreover, it is accorded and assented, that no appeal be from henceforth made or in any wise pursued in parliament in time to come."

For the better understanding of the construction of these statutes, and the nature of this court, I shall examine the following particulars:—

FIRST, How far the said court hath conusance of points of honour in general.

SECONDLY, Whether it can punish private persons for marshalling funerals.

THIRDLY, Whether it can be holden by a lord marshal alone without a constable.

FOURTHLY, Whether its power as to appeals of treason be superseded by 26. or 35. Hen. 8.; or 5. & 6. Edw. 6. c. 11.; or 1. & 2. Ph. and Mary, c. 10.

FIFTHLY, By what law, and in what manner it proceeds.

SIXTHLY, Whether it may be prohibited, if it exceed its jurisdiction.

SEVENTHLY, Whether it can ~~be~~ holden by commission.

1. Hale 590.

(a) 7. Mod.
128.

Salk. 55.

2. Rushworth
1055, 1056.

(b) Hob. 121.

1. Rol. 87.

2. Lev. 134.

Shower 353.

1. Sid. 353.

1. Lev. 230.

(c) 2. Rushworth
1055, 1056.

(d) Shower's
Parl. Caf.

64, 65.

S: H. 7. As to THE FIRST POINT. It is observable, That the abovementioned statute of 13. Rich. 2. c. 2. declares the jurisdiction of this court in relation to things done within the realm in these words, "To the constable pertaineth conusance, &c. of things that touch war within the realm, which cannot be determined nor discussed by the common law;"—from whence it seems to follow, that this court has nothing to do with a mere civil matter, no way relating to war; and therefore the proceedings of the court of the lord marshal, in the time of king *Charles the First*, for bare scandalous words reflecting on the (a) honour or gentility of families, seem no way to be maintained. Yet it seems to be taken for granted in some (b) books, That disputes concerning precedency, and points of honour, and satisfaction therein, are proper for this court. Neither do I find, That the proceedings therein against persons for falsely assuming the name and arms of honourable families, were censured or disallowed by the (c) learned members of the committee of the House of Commons in the year 1639, who were appointed to inquire into the abuses of this court. And it seems to be (d) admitted in the argument of *Oldis's case*, That all matters of this nature are proper for this court: yet it seems to be a large interpretation to make these things relate to war, so as to come within the declaration
above

abovementioned; and the rule laid down in *(a) Rolle's Re-* (a) 1. Roll. 37.
ports, that the marshal has power given him where the com-
 mon law gives no remedy, seems no way maintainable from
 the statute; for it doth not say in general, "That to the con-
 stable pertaineth consueance of things which cannot be de-
 termined by the common law," but of "things of war, &c."
 "which cannot be thereby determined" (b): neither is it a (b) 13. Hen.
 conclusive argument, that a matter which is remediable by the 4. 4. 5.
 common law, must have a remedy from some other law;
 yet inasmuch as by the preamble of the said statute, its chief
 intention appears to be to prevent incroachments on the
 common law, and such proceedings in matters whereof the
 common law hath no consueance, it cannot be said any way
 to incroach upon it. And inasmuch as the said statute is
 wholly declarative, and hath no negative words; and the
 constant practice, which is the best interpreter of laws, and
 the general opinion of lawyers, seem to countenance such
 proceedings; I shall not take upon me to determine how far
 they may be warrantable.

S. H. 8. AS TO THE SECOND POINT, viz. Whether this 1. Lev. 230.
 court can punish private persons for marshalling funerals. 1. Sid. 353.
 Though it should be granted, That the marshalling of pub- Shower 353.
 lick funerals belongs to the heralds, who are attendants on 7. Mod. 128.
 this court, and that no other persons without their licence
 can lawfully intermeddle therein; yet it does by no means
 follow, That the marshal has power to punish those who
 shall be guilty of any such incroachment; but the proper
 remedy seems to be by action on the case at common law,
 and not by a suit in this court, which by the abovementioned
 statute of 8. and 13. Rich. 2. has cognizance only of
 such matters which cannot be determined nor discussed by
 the common law. And this seems to be the principal reason
 of *Dr. Oldis's Case*, wherein a suit in the marshal's court
 against one *Domville*, for taking upon him without licence
 to paint arms and escutcheons, and causing them to be fixed
 to hearfes, and providing and lending palls for funerals, and
 painting arms for one who had no right to their use at the
 funeral, and marshalling several funerals, &c. was prohibi-
 ted by the court of Exchequer, upon great deliberation,
 with the advice of the rest of the judges, and the judgment
 was afterwards confirmed by the House of Lords.

Cases in Parl.
 58, &c.

In *Hill v. Ann*, Lord Holt said, "The ministers of this court would have the words
 "of 13. Rich. 2. to mean coats of arms and escutcheons, matters which they very well
 "understand; and if they find people assume arms to whom arms do not belong, or at
 "least, that those they assume do not belong to them, their way is to post them up,
 "but by what law or justice they do this I cannot tell." 7. Mod. 128.

Sett. 9. As to THE THIRD POINT, *viz.* Whether this court can be holden by the lord marshal alone without the constable. It was strongly insisted in the (a) arguments made use of in *Dr. Oldis's Case*, That the lord marshal cannot hold this court without the constable; and this was also the opinion of the (b) abovementioned learned committee of the House of Commons in the year 1639. And it is certain, That all our ancient (c) law-books and (d) reports which speak of this court, speak of it either as the court of the constable and marshal, or of the constable (e) only; and it is observable, that the abovementioned statute of 13. Rich. 2. which in the preamble speaks of this court as the court of the constable and marshal, in the body of the act mentions the constable only. And it is farther remarkable, That wherever the constable is mentioned together with the marshal-as judge of this court, he is always put before him; which seems to intimate, that he is looked upon as the principal judge of it: and it is agreed by (f) all, That the marshal cannot determine an appeal of death, or treason, without a constable. But, on the other side, it may be argued, That the reason why an appeal of a capital matter necessarily requires a constable as well as marshal is, because the first of *Henry the fourth*, which orders how such an appeal shall be brought, is express: "that it shall be tried and determined before the constable and marshal of England for the time being;" whereas the other statutes only provide against the incroachments of this court, and do not mention in what manner or before whom it shall be holden, but they seem to refer such questions to ancient usage; so that if (g), before these statutes, the court was usually holden before the constable and marshal jointly and severally (h), according to the common usage of other courts, which generally may be holden before one judge in the absence of the rest, it seems a reasonable construction of the said statutes to allow this court still to be so holden. Neither is it probable, That the lord marshal, upon the extinguishment of the hereditary office of the constable, should from time to time in the (i) reigns of king *Henry the eighth*, queen *Elizabeth*, and king *James the first*, hold this court by himself without any constable, and also often be assisted therein by the judges of the common law, unless it were then well known, that such his proceeding was warranted by the ancient and established usage of his court; and it is very extraordinary, That our judges and lawyers should (k) generally take it as a thing granted, that the marshal is at this day the proper judge of points of honour, &c. if it were imagined that he has no power to act without the concurrence of a constable.

Sett.

(a) Cases in
Parl. 65, 66. s.
Far. 127, 128.
Vide Harg.
Co. Lit. p. 75.
note (7)

(b) 2. Rushw.
1056.

(c) S.P.C. 65.
Crom. Jur. 82.

2. Inst. 51.

4. Inst. 123.

Co. Lit. 261.

391.

(d) 13. H. 4.

46.

37. H. 3. 5.

48. E. 3. 3.

37. H. 6. 20,

21.

(e) 30. H. 6. 6.

13. H. 4. 5.

(f) 1. Inst. 74.

Rushw. 107.

112, &c.

Cases in Parl.

61.

1. Lev. 230.

Hutton 3.

(g) Cases in
Parl. 60, 61.

(h) See Ch. 1.

S. 10.

(i) Cases in
Parl. 60, 61.

Far. 126.

4. Inst. 126.

4. Comm. 264.

(k) Hob. 121.

1. Roll 87.

2. Lev. 134.

Shower 354.

1. Sid. 353.

1. Lev. 230.

Seft. 10. As to THE FOURTH POINT, *viz.* Whether the power of this court as to the appeals of treason, be superseded by the statutes of 26. Hen. 8. c. 13. the 35. Hen. 8. c. 2. the 5. & 6. Edw. 6. c. 11. or the 1. & 2. Ph. and Mary, c. 10. by the said statutes of *Henry the eighth* and *Edward the sixth*, 2. Hale 163. "All treasons, &c. done out of this realm shall be inquired, heard, and determined before the King's Bench, or before commissioners, &c. as if they had been done in the same shire wherein they shall be inquired of, &c." And by the statute of *Philip and Mary*, "All trials for any treason shall be only according to the due order and course of the common law." Yet it hath been adjudged, *Cases in Par.* 62. That none of these statutes take away the jurisdiction of this court in relation to such treason: for the said statutes of *Henry the eighth* and *Edward the sixth* being wholly in the affirmative, and it being their chief intention to supply a defect in the common law, which had provided no method for the trial of such offences by jury, they shall not without express words be construed to take away the authority of an ancient court confirmed by parliament; and therefore the abovementioned expression, "That all such treasons shall be tried by the King's Bench, &c." shall be taken to support no more than that the King's Bench, &c. shall have authority to try them; and as to the 1. & 2. Philip and Mary, the plain import thereof seems to be, to restore the ancient manner of trial by the course of the common law to all treasons within its jurisdiction, which had been much altered by some statutes in the former reigns; and this is fully satisfied by abolishing all innovations in the proceedings at common law, and has no relation to cases no way within its consufance. *Rushw.* 107. *Dyer* 131. 3. *Inst.* 24. 4. *Inst.* 124.

Seft. 11. As to THE FIFTH POINT, *viz.* By what law and in what manner this court proceeds. There is no doubt but that it ought to follow its own customs and usages so far as they go, and in cases omitted, the rules of the (a) civil law. And because this is not a court of common law, a (b) condemnation in it for a capital offence causes neither forfeiture of lands nor corruption of blood; neither can an error in its proceedings be remedied by writ of error, but only by appeal to the king: and yet the judges of the common law take notice of the jurisdiction of this court, and give credit to a certificate of its judges, for the trial of an (c) issue concerning its proceedings; (d) for the civil law is as much the law of the land in such cases wherein it has been always used, as the common law is in others. (a) 4. *Inst.* 125. 2. *Inst.* 51. 1. *Inst.* 261. 37. H. 6. 3. 20. (b) 4. *Inst.* 125. *Rushw.* 107. 113, &c. *Cases in Parl.* 62. 2. *Inst.* 51. (c) 4. *Inst.* 125. 341. *Cases in Parl.* 62. (d) 30. H. 6. 6. 37. H. 6. 3. 20. b. 21.

Hutton 3.

Sec. 12. It is questioned, Whether the king hath any remedy in this court against an offender by way of *indictment* or *information* by the attorney general.

Cases in Parl.
61. 66.

Sec. 13. As to THE SIXTH POINT, *viz.* Whether this court may be prohibited, if it exceed its jurisdiction. It is expressly resolved in *Oldis's case*, That the said court being holden before the lord marshal only, may be prohibited by the courts of common law, if it exceed its jurisdiction; and it is strongly insisted on in the argument of that case, That the court of the constable and marshal may also be prohibited: but there having been no court holden before a constable and marshal for these many years, and there seeming to be small likelihood of its being revived, I shall refer the reader for the farther examination of this matter to the learned Sir *Burtholomew Shower's* report of the said case.

In Hil. 1. Ann. *HOLT Chief Justice* doubted of the possible existence of the court of honour; and, after a search of precedents, granted a prohibition to a libel brought in such pretended jurisdiction. *Salks* 553.

1. Lev. 230.
1. Sid. 353.

Sec. 14. As to the SEVENTH POINT, *viz.* Whether the said court can be holden by commission. It seems to be the better opinion of the court in *Parker's case*, That during the lunacy of an earl marshal, it may well be holden before commissioners deputed to exercise his office; and it seems hard to say, That such commissions, founded on the plain necessity of the case, and intended to prevent a failure of justice as to cases of which no other court hath cognisance, are against the purview of the PETITION OF RIGHT, made in the third year of the reign of king *Charles the first*; which complaining that commissions had been granted for the trial of certain capital offences and other outrages by the martial law, under pretence whereof divers of the king's subjects had been put to death, prays, "that from thenceforth no commissions of like nature might issue forth to be executed as aforesaid."

CHAPTER THE FIFTH.

OF THE COURT

O F

THE JUSTICES OF OYER AND TERMINER.

FOR better understanding of the nature of the courts of 4. Comm. 266.
the justices of *oyer* and *terminer* and gaol-delivery, I shall premise some considerations concerning them in general, and then consider the nature of each of them in particular.

SecT. 1. But in the first place, it may not be improper Lamb. B. 1. 5.
to remark, That the prerogative authorizing those or any Co. Lit. 114.
other justices, is inseparably united to THE CROWN, not only 1. Lev. 219.
by the common law but also by statute. To which purpose Bac. El. of
it is enacted by 27. Hen. 8. c. 24. “That no person Law 15, 16.
“or persons, of what estate, degree, or condition soever
“they be, shall have any power or authority to make any
“justices of eyre, justices of assize, justices of peace, or
“justices of gaol-delivery; but that all such officers
“and ministers shall be made by letters patent under the
“king’s great seal, in the name and by the authority of the
“king’s highness in all shires, counties palatine, Wales,
“&c. or any other his dominions, &c. any grants, usages,
“allowance, or act of parliament to the contrary notwithstanding.”

As to what belongs to justices of *oyer* and *terminer*, and gaol-delivery in general, I shall examine—

FIRST, By what kind of instruments they must be constituted.

SECONDLY, How their authority may be suspended, revived, or determined.

THIRDLY, How far the precise letter of their commissions must be observed by such justices.

FOURTHLY, What form is to be observed in the adjournment of such commissions.

FIFTHLY, How far the power given by them may be extended by other commissions to other justices, or committed to fewer than were appointed by the former.

SIXTHLY, Whether such justices can sit in one county to try in another.

SEVENTHLY, Where their records are to be kept after they are determined.

EIGHTHLY, Whether the same justices at the same time may execute both commissions.

AS TO THE FIRST POINT, *viz.* By what kind of instrument such justices must be constituted.

SECT. 2. It seems to be laid down as a general rule in some of the old books, That though a justice may be discharged by writ under THE GREAT SEAL, yet that he cannot be made a justice by such writ, but only by (a) commission. And it seems to be holden, both by (b) *Sir Edward Coke* and *Sir (c) Matthew Hale*, If any such justices have their authority by writ, though made in the same form and words that a legal commission ought to have, yet their proceedings are void; and yet it seems, that nothing more is meant by these expressions, if strictly examined, than that all such justices must derive their authority from such instruments as are of a known, stated, and allowed form, warranted by ancient precedents; and it is only a dispute of words whether such instruments are to be called writs or commissions; for if you take the import of the word writ from (d) *Finch's* definition of it, who says, That "it is a Latin letter of the king's, from his higher courts of record, in parchment, sealed with his seal, and tested by him," it seemeth that the most approved forms of commissions of *oyer and terminer*, &c. may well enough come under the general notion of writs, which by the last mentioned (e) author are divided into writs original and commissional. And accordingly we find, That commissions of *oyer and terminer*, association, and *si non omnes*, granted upon special occasions, are called writs both by the (f) *Register*, and also by (g) *Fitzherbert*, who yet seems not to approve of this general notion of the word writ, and says, That these commissions should not properly be called writs. Also it is said by *Sir Edward Coke* in his comment upon the statute of *Westminster the second*, (h) which mentions the writ of *oyer and terminer*, that commissions were anciently granted by writ; by which he seems to imply, That they are otherwise granted at this day; but he doth not tell us the distinction between a writ and a commission; neither can

(a) L. Quinto
Ed. 4. 13. 27.
42. Aff. 12, 13.
14. Aff. 184
Commissi. 16,
18.
Indict. 22. 38,
39.
Finch 247.
(b) 4. Inst. 164.
(c) Summary
161.
1. Hale 23.
(d) Finch
237.
Theob. Dig.
of Writs 1, 2.

(e) Finch 12.
318.
Theob. 2.
(f) Regi.
123, 124.
(g) F. N. B.
110, 111.
Crom. Jur.
131.
(h) ch. 32.

can I find that the modern precedents differ from the old ones; but on the contrary, that it hath always been agreed, that it is the safest way to follow the old ones. But I must confess, that I cannot find a certain instance from any book of authority, wherein general commissions of *oyer and terminer* are called writs. However, as to the resolutions of the judges in The *Book of Assizes*, which are but briefly and obscurely reported, and yet seem to be the chief foundation of what is said in the later books relating to this matter, the authority thereof seems to amount to no more than the two following points:

First, That justices appointed by commission to hear and determine certain offences, cannot receive an additional power by writ directing them to inquire of other offences; and this seems to be the sense of (a) *Stamford* and (b) *Fitzherbert* in relation to this matter.

16, 18. Indict. 22. 38, 39.

Vide infra, sect. 34.
42. Ass. pl. 12.
13.
(a) S.P.C. 94.
(b) Indict. 7.
B. Commissi.
12. Co. 31.

Secondly (c) That writs impowering persons to inquire of offences, without authorizing them also to determine them, are illegal, except in such cases wherein they are allowed by ancient usage, as were (d) writs of this kind to sheriffs before the statute of 18. Edw. 3. c. 9.

(d) Reg. 121.
S.P.C. 84.

And therefore where it is generally said in some (e) books, That commissions have been directed to certain persons to inquire of certain offences, in order to have them afterwards tried before other justices, it seems that it ought to be understood, That such commissions were in the common form of commissions of *oyer and terminer*, though they be spoken of only as commissions of inquiry. As to the resolution in the *Long (f. Quinto of Edward the fourth*, which is the other principal authority concerning this matter, the import thereof seems to be no more than this, that a person cannot legally be associated to justices of assize by a writ directed to such justices, reciting a *commission of association* to such person, and commanding the justices to receive him, unless there be also produced a *commission of association* directed to such person, for that the king cannot make a justice by such writ directed to others; by which it seems to be implied, that by a proper writ he may do it. And it is certain, That the *commission of association* directed to the party himself, is called a *writ* both by the (g) *Register*, (h) by *Fitzherbert*, and by (i) *Finch*, and also by (k) *Sir Edward Coke*, as well as the *writ of admittance* directed to the other justices. However, it seems clearly to be agreed by all these books, that the best rule of judging of the validity of any such commissions is their conformity to known and ancient precedents; and this seems to be the best reason of the resolu-

(e) 1. And.
106.
Vide Plow.
390.

(f) Fol. 111,
112. 29. 137,
138.

(g) Regi. 124.
(h) F. N. B.
111.
(i) Finch 318.
(k) 4. Inst.
107.

tion

1. Vol. p. 295.
Popham 16.

lution in *Anderſon*, wherein it is adjudged, that a commiſſion to a corporation appointing ſome of its principal members to be juſtices of gaol-delivery, together with thoſe whom the king ſhould appoint, from time to time, is void; for ſuch an authority, depending on the precarious appointment of other juſtices, is not agreeable to the known forms of ſuch commiſſions. The other reaſon given in that book for ſuch newly-appointed juſtices not joining with the former, becauſe their authority commences at ſeveral times, ſeems not concluſive; for the authority of juſtices appointed by *writ of aſſociation* is of a ſubſequent commencement from that of the juſtices in the firſt commiſſion; and yet it is certain, that ſuch may act jointly together, as will more fully appear in the following chapter.

2. Hale 24, 25.

As to THE SECOND POINT, *viz.* How the authority of ſuch juſtices may be ſuſpended, revived, or determined.

(a) See ante
ch. 3. f. 10.

Seſt. 3. There is no doubt but that their power is wholly ſuſpended by the court of King's Bench ſitting in the ſame county for which they are commiſſioned during the time of ſuch ſitting, eſpecially if they have notice thereof, as hath been before ſhewn (a); and it ſeems that their juriſdiction is revived of courſe, when the ſaid court no longer ſits there, without any writ of *procedendo*, &c. Their (b) authority may be alſo ſuſpended by a writ of *ſuperſedeas*, which is grantable on proof that their commiſſion was unduly granted; in which caſe their power may be reſtored by a writ of *procedendo*, without any new commiſſion. But a commiſſion once determined, cannot be revived by any writ of *procedendo*, nor the juſtices authorized anew without another commiſſion.

(b) Reg. 124,
125.
12. Aff. 21.
4. Inſt. 163.
Sum. 162.
Strange 332.
865.

4. Inſt. 163.

Seſt. 4. Such commiſſions may be determined expreſsly or impliedly. Expreſsly, by an abſolute repeal or countermand from the king. Impliedly, ſeveral ways.

Ch. 1. f. 12,
12, 13.

Seſt. 5. Firſt, By the demife of the king by whom they were granted. But this miſchief is in a great meaſure obviated by late ſtatutes, as hath been more fully ſhewn.

B. Commiſſ. 4.
22.

Seſt. 6. Secondly, According to ſome opinions, by the juſtice's acceptance of any new name of dignity, as that of duke, knight, ſerjeant, &c. But this is remedied by 1. Edw. 6. c. 7. which enaſts, " That if any perſon, being in
" any of the king's commiſſions whatſoever, ſhall fortu-
" to be made or created duke, archbiſhop, marqueſs, earl,
" viſcount, baron, biſhop, knight, juſtice of the one bench
" or of the other, or ſerjeant at law, or ſheriff, yet that
" notwithſtanding he ſhall remain commiſſioner," &c. But
it

is hath been questioned, whether the dignity of a baronet, which has been created since that statute, be within the equity of it. Cro. Car. 104. Lit. Rep. 81.

Sett. 7. Thirdly, By holding a session without adjourning it, if the commission have no time limited for its continuance; as where it is appointed *pro hac vice* only: but if it be granted for a certain time, or *quamdiu nobis placuerit*, it does not necessarily require any adjournment; and therefore, if the court holden by virtue of such commission break up without any adjournment, or upon a void one, as being made without the consent of the majority of the commissioners, yet it may be holden again on a new summons. Crom. Jur. 125. b. Summary 161. 4. Inst. 165. B. Commiff. 12. Dalif. 24, 25. Dyer 205. 4. Inst. 165. 1. Leon. 270. 10. Ed. 4. 7.

Sett. 8. Fourthly, By granting a new commission to other persons of the same nature with the former, though but for part of the district for which the former was granted, as some say. And whether (a) such new commission be for a certain time, or *pro hac vice* only, yet the former commissions shall remain (b) in force, so far as they are consistent with the latter; and therefore it seems, certain that a commission of the peace is not determined, as to its authority relating to the peace, by a new commission to hear and determine felonies. But it hath been (c) holden, that it is determined as to its authority relating to felonies; but this seems justly questionable, not only as being contrary to common practice, but also because justices of peace, as such, seem to have authority by 34. Edw. 3. to hear and determine felonies, without any special clause in their commission for that purpose, as will more fully be shewn in Chapter the Eighth. But it seems certain, that a commission of (d) gaol-delivery shall not be determined by a new commission of oyer and terminer, because they are of different natures. (e) Also it seems to be clear, not only from 2. & 3. Ph. and Mary, c. 18. set forth more at large section twelfth, but also in cases not within the statute, that a commission of the peace for a certain town determines not the authority of the corporation having a grant from the king that the mayor and his successors shall be justices of the peace within its limits, because such a grant is irrevocable. (f) Also it seems certain, that no new commission doth determine an old one, unless the former commissioners have notice of it. (a) Brocke Commission pl. 7. (b) Ibid. 8. 24. (c) Ibid. 8. (d) Ibid. 24. (e) Ibid. 5. (f) Summary 162. 1. Hale 499. 2. Hale 25. 4. Inst. 165. 34. Aff. 8. B. Commiff. 6. 14.

Sett. 9. Such notice may be given expressly or impliedly. Expressly, by (g) shewing the new commission to the former commissioners, which certainly determines the power of all those to whom it is shewn. Impliedly, two manner of ways. (g) Summary 162. 4. Inst. 165. Kilw. 116. Com. Jur. 125.

(a) 34. Aff. 8. b. *Sec. 10.* First, By (a) holding a session by force of the new commission, which seems to be agreed to be a matter so notorious, that the first justices shall be presumed to have notice of it.

2. Hale 25.
Dyer 355.
4. Inst. 165.
B. Commiff. 6.
Keilw. 116.

Process shall not discontinue upon supercession of the commission under which it was made.

1. Sid. 348.
2. Keb. 292.
B. Cor. 178.

Sec. 11. Secondly, According to the general opinion, by proclaiming the new commission in the county.

Sec. 12. As the authority of the justices appointed by any former commission is determined by a grant of a new one in the manner abovementioned, so likewise were all proceedings before such justices discontinued at the common law. To remedy which inconvenience it was enacted by 1. Edw. 6. c. 7. §. 6. " That no manner of process or suit made, sued, or had before any justice of assize, gaol-delivery, *oyer* and *terminer*, justices of the peace, or other of the king's commissioners, shall in any wise be discontinued by the making and publishing of any new commission or association, or by altering the names of the justices of assize, gaol-delivery, *oyer* and *terminer*, justices of peace, or other the king's commissioners, but that the new justices of assize, gaol delivery, and of the peace, and other commissioners, may proceed in every behalf as if the old commissions, justices, and commissioners had still remained and continued not altered."

Commissions of the peace and gaol-delivery for a county shall not vacate such commissions to a city within the county, not being a county in itself.

Sec. 13. And it is farther enacted by 2. & 3. Ph. and Mary, c. 18. " That all commissions granted to any city or town-corporate, not being a county in itself, for the keeping of their peace and delivery of the prisoners remaining in the gaols of any such city or town-corporate, shall stand, remain, and be good and available and effectual in the law, to all intents, constructions and purposes; the granting of any like commission of peace or gaol-delivery to any commissioner or commissioners for the conservation of the peace, or delivery of the prisoners remaining in the gaol of any shire, lathc, rape, riding, or wapentake, within the realm of *England*, bearing date after the said commission or commissions granted as is aforesaid to any such city or town-corporate, not being, as aforesaid a county in itself, to the contrary notwithstanding."

12. Aff. 21.
Crom. Jur. 126.
L. Quinto. E. 4.
123.
Dalif. 25.

As to THE THIRD POINT, viz. How far the precise letter of such commissions must be observed by the justices.

Sec. 14. It is said to be agreed, That if a commission of *oyer* and *terminer*, &c. be awarded to certain persons to inquire at such a place, they can neither open their commission

~~Then~~ at another, nor adjourn it thither, nor give judgment there; and that if they do, all their proceedings shall be esteemed as *coram non iudice*. Yet it is agreed, that justices appointed by commission *pro hac vice*, may adjourn their commission from one day to another, though there be no words in their commission to such purpose; for nothing can be more reasonable, than to intend that a general commission authorizing persons to do a thing, does implicitly allow them convenient time for the doing of it.

3. Inft. 31.
2. Hale 24.
Summary 160.
B. Commif.
18.
Kelynge 57.

As to THE FOURTH POINT, *viz.* What form is to be observed in the adjournment of such commissions.

Sett. 15. Having already, in the foregoing part of this chapter, incidentally treated of the principal questions relating to this matter, I shall only take notice in this place, that it seems most proper (a) to enter all such adjournments in the present tense; yet it is said, that the entry of them in the preter tense, is made good by the multitude of precedents (b): however, it is said, that this court will never intend that there was an adjournment, if no entry at all were made of it.

Sec. 6. & 13.
(a) Raym. 115.
(b) 1. Sid. 348.
2. Kcb. 284.
292.

As to THE FIFTH POINT, *viz.* How far the power given by such commissions may be extended by new ones to other justices, or committed by fewer than were appointed by the former.

2. Hale 23.

Sett. 16. It is certain, that new commissioners of this kind may be added to the former by a writ or commission of association, which, setting forth the purport of the former commission, declares the king's pleasure to associate to the persons appointed by the first, those to whom such new writ or commission is directed, provided that such new justices attend at the times and places appointed by former; and it is usual to direct another writ to the former justices, commanding them to admit such new justices as their associates, with the proviso abovementioned; and the writ to the persons so associated is always patent, and that to the other justices to admit them is clofe. But it hath been (c) resolved, that the first justices are not bound by such writ to admit the persons named in it as their associates, unless they produce such patent of association as is abovementioned directed to themselves, as hath been more fully shewn in the first section of this chapter. And it hath been (d) questioned, whether a special commission of association, relating only to a particular cause, can associate the persons named in it to justices appointed by a general commission. Also it hath been holden, That the king can grant but one patent of association to one commission.

Reg. 124.
F. N. B. 111.
Finch 318,
319.
Sum. 159. 162.
4. Inft. 165.

(c) L. Quinto
E. 4. 137.

(d) L. Quinto
E. 4. 111. 112.
130, 131.
F. Affize, 17.
3. H. 62. 10.

Sett.

Reg. 128.
F. N. B. 111.
113, 114.

Sett. 17. If any justices have sat by virtue of a commission, and taken divers indictments, and awarded process thereon, and they shall all, or some of them, die, the king may grant a new commission to those who are living only, or to others, commanding them to continue the proceedings begun, and to proceed upon such process, and to hear and determine all the offences in the former commission: and thereupon the king shall send a writ unto the executors of the justices who are dead, to send the rolls, records, and processes touching the premises, before the new commissioners, &c.

Reg. 124.
F. N. B. 111.
2. Hale 23.

Sett. 18. After a writ of association, it is usual to make out a writ of *fi non omnes*, directed both to the first justices, and also to those who are so associated to them; which, reciting the purport of the two former commissions, commands the justices, that if *all of them cannot* conveniently be present, such a number of them may proceed, &c.

As to THE SIXTH POINT, *viz.* Whether such justices may sit in one county to try offences in another.

2. Hale 21, 22
3. Inst. 27.
Sum. 162, 163.
Dyer 186.
Pop. 16, 17.
1. And. 291,
292.
Douglas 793.
796.

(a) Rex and
Gough, Trin
21. Geo. 3.
Doug. 760.
Rayn. 193.
Vaugh. 140.
Wood 619.

Cro. Eliz. 137.
Post. 22, 220.
Plow. 390.
Quere; vide
Douglas 796.

Sett. 19. It seems agreed, that regularly all offences are to be enquired of, heard, and determined in the county wherein they were committed, and that the king cannot authorize the taking of them in another. Yet it was adjudged in the case of the *City of Gloucester*, that if the king grant to a city the privilege of being a county of itself, distinct from the county within which it lies, with a salvo or reservation, that the justices of *oyer and terminer*, &c. for the county at large may still sit in such city, such reservation makes the city still remain part of the county for such purpose, and consequently that an indictment found within such city, of an offence in the county at large, is good (a). Also it is certain, That, by a special custom, indictments of offences within a county may be taken in a place out of it; as they are in fact taken both for *Middlesex* and *London* at the Sessions-hall at NEWGATE, which stands in London; for it shall be intended, that at the original division of *London* from *Middlesex* there was a special provision made for this purpose. Also it is certain, That the king may grant a special commission of *oyer and terminer* to sit in one county for hearing and determining offences, whereof indictments have been found in another: but it is agreed, that the trial must be by the jurors of the proper county.

2. Hale 31, 36.
24. H. 7. 15.

As to THE SEVENTH POINT, *viz.* Where the records such justices are to be kept after they are determined.

Sett.

Sec. 20. It is enacted by 9. Edw. 3. c. 5. "That justices of assize, gaol-delivery, and of oyer and terminer, shall send all their records and processes determined and put in execution to the exchequer at Michaelmas, every year once, to be delivered there; and the treasurer and chamberlains which for the time shall be, having the sight of the commissions of such justices, shall receive the same records and processes of the said justices under their seals, and keep them in the treasury, as the manner is, so that the justices always do first take out the estreats of the said records and processes against them, to send to the exchequer as they were wont before."

As to THE EIGHTH POINT, viz. Whether the same justices at the same time may execute both the commission of oyer and terminer, and also that of gaol-delivery.

9. H. 7. 9.
B. Commiss.
17. 24.
Crom. Jur.
126. b.
2. Hale 34.
166.
Summary 160.
F. Cor. 47.
9. H. 7. 9.

Sec. 21. It seems certain at this day, that the same persons being authorized by both these commissions, may proceed by virtue of the one in those cases wherein they have no jurisdiction by the other, and execute both at the same time, and make up their records accordingly. But this doth not seem to have been clearly agreed in former times.

AND now I am to consider the nature of each of the abovementioned commissions in particular; and first of that of oyer and terminer, concerning which I shall endeavour to shew, FIRST, Its several kinds. SECONDLY, To what cases the jurisdiction given by it doth extend. THIRDLY, To whom, and on what occasions it is grantable.

As to THE FIRST POINT. Commissions of oyer and terminer and gaol-delivery are of two kinds: General, and Special.

Sec. 22. At this day the common form of such a general commission is, to authorize the persons to whom it is directed, or three or four of them, of which number either such or such particular persons among them are specially appointed to be, to inquire by the oaths of lawful men, and by other means, of all treasons, felonies, and misdemeanors, being specially mentioned, and of all others, in such and such counties, and to hear and determine the same at certain days and places to be appointed by them, &c. For which purpose the king acquaints them, that he hath sent writ to the sheriffs of such counties, commanding them to return a jury before them, at such days and places as shall be notified by them, in order to make inquiries of such offences, &c.

4. Inst. 162,
163.
Crom. Jur.
131.
Plow. 384.
2. Inst. 419.
2. Hale 22, 23.
Reg. 123.

Sec. 7.

F. Edm. 173. *maxim, quod expressio eorum quæ tacite insunt nihil operatur*; especially considering that the court holden before justices of eyre, &c. is a court of record of a very high nature, and much regarded by the law. As to the objection, that the construction contended for would extend such suits to all inferior courts of record, it may be answered, that it would only extend them to such courts of a general jurisdiction wherein suits of like nature may properly be brought, and not to courts of a limited authority, instituted for special purposes, and confined either to offences at the common law, as *the court leet and the sheriff's town* are, or to contracts of a special nature, as the court of *pie-powders* is. As to the objection, that it is most reasonable to construe the statute to intend only such courts wherein the king's attorney attends, the same may be said in relation to prosecutions on statutes which mention no court at all wherein they shall be brought; and yet it seems to be certain, that such prosecutions may be brought in any court of eyre and *terminer*. Neither do I find any reason assigned, why the king's prerogative, of choosing in what court he will commence a suit, should be restrained without express words in this case, where courts are mentioned in general, more than in the others, where they are not mentioned at all. Besides it ought to be considered, that if such prosecutions are to be confined to the courts of *Westminster*, no offence against any such statute in any county but that wherein the king's bench sits, could be indicted at all; for it is certain, that no offence can be inquired of out of the county wherein it was committed. Also since 21 Jac. 1. c. 4. set forth more at large in the chapter concerning Informations, which restrains all prosecutions whatsoever on penal statutes to their proper counties (as the construction of the said statute is now settled), if suits on such statutes could be brought only in *Westminster-hall*, no offences out of *Middlesex* could be prosecuted at all.

Dy. 236.

AS TO THE THIRD POINT, *viz.* To what persons, and on what occasions, commissions of eyre and *terminer* are grantable.

SECT. 34. It is enacted by the statute of *Westminster the second*, c. 29. "that a writ of trespass (*ad audiendum et terminandum*) from henceforth shall not be granted before any justices, except justices of either bench, and justices in eyre, unless it be for a heinous trespass, where it is necessary to provide speedy remedy, and our lord the king of his special grace hath thought it good to be granted."

SECT. 35. And it is farther enacted by 2. Edw. 3. c. 2. "that *eyers* and *terminers* shall not be granted but before justices

“ justices of the oſſe bench or the other, or the justices er-
 “ rants, and that for great hurt or horrible treſpaſſes, and
 “ of the king’s ſpecial grace, after the form of the ſtatute
 “ abovementioned.”

ſect. 36. Alſo it is enacted by 34. Edw. 3. c. 1. “ that
 “ writs of *oyer* and *terminer* be granted according to the
 “ ſtatute thereof made, and that the justices which ſhall be
 “ thereto aſſigned, be named by the court, and not by the
 “ party.”

ſect. 37. It may perhaps be argued from the general
 words of theſe ſtatutes, that no commiſſion of *oyer* and
terminer ought to be granted to any, but ſuch justices as
 therein mentioned, and on ſuch ſpecial occaſions. And
Sir Edward Coke, in his comment on the ſaid *ſtatute of*
Weſtmiſter the ſecond, does not ſhew whether all ſuch
 commiſſions in general are meant to be reſtrained by it, or
 ſuch only as are of a particular nature; yet, if the intention
 of the ſaid ſtatutes be fully examined, it ſeems reaſonable
 to confine the purview of them to ſpecial commiſſions of
oyer and *terminer*, granted at the complaint of particular
 perſons, upon ſome great injury ſuggeſted to have been
 done to them; not only for that ſuch ſpecial commiſſions,
 for redreſſing of a particular grievance at the ſuit of the
 party, ſeem to come more properly and generally under the
 notion of writs, than general commiſſions iſſued by the king
 as the common diſpenſer of juſtice to his people, without
 any particular application from or regard to any particular
 perſon; but alſo becauſe there may be a miſchief to the
 ſubject from ſuch ſpecial commiſſions, which cannot be
 feared from the general ones; for the party who ſues out
 ſuch a ſpecial commiſſion, may thereupon take out a writ
 to the ſheriff, commanding him to arreſt the goods ſup-
 poſed to be wrongfully taken away, and to keep them in
 ſafe cuſtody till ſome order be made concerning them by
 the justices aſſigned to determine the matter, which may be
 very inconvenient to the perſon complained of. Neither
 can it be imagined, that the ſtatute intended to reſtrain ge-
 neral commiſſions to enormous treſpaſſes, which could not
 but hinder the due execution of juſtice, which requires the
 puniſhment of all kinds of miſdemeanors, of which ſuch
 commiſſioners are the uſual and proper judges. But it is
 reaſonable indeed, that ſuch ſpecial commiſſions ſhould not
 be granted but upon urgent occaſions; and accordingly we
 find precedents for the ſuperſeding of them, where the king
 has been informed, that he was impoſed upon in granting
 them on a ſuggeſtion that the injury complained of was of

2. Inſt. 418.

Thel. Dig. 1.
 2. ante ſ. 1.
 2. Inſt. 419.

Reg. 126,
 177.
 2. Inſt. 419.
 F. N. B. 112.

Reg. 124, 125.
 12. Aff. 41.

a heinous nature, where in truth it was but a slight inconsiderable trespass.

For other particulars concerning the proceedings of justices of *oyer* and *terminer*, see the chapter concerning **APPEAL**, and the chapter concerning **PROCESS AGAINST THE JURY**.

CHAPTER THE SIXTH

OF
THE COURTOF
GAOL DELIVERY.

FOR the better understanding of the nature of the commission of GAOL-DELIVERY, I shall consider, 4. Comm. 169.

FIRST, What ought to be the form of it.

SECONDLY, What jurisdiction the justices authorized by it have by the common law.

THIRDLY, What by statute.

FOURTHLY, In what place they ought to hold their sessions.

Sect. 1. As to **THE FIRST POINT.** Having already shewn that all judicial commissions must be agreeable to ancient precedents, I shall only shew in this place, the purport of the most usual commission of gaol-delivery, which is a patent in nature of a letter from the king to certain persons, appointing them his justices, or two or three of them of which number either such or such a particular person among them is especially required to be, and authorizing them to deliver his gaol, at such a place, of the prisoners in it; for which purpose it commands them to meet at such place, at the time which they themselves shall appoint, and informs them, that for the same purpose the king hath commanded his sheriff of the same county to bring all the prisoners of the gaol, and their attachments, before them, at such day to be appointed by them. 167.
Ch. 1.
Ch. 5.
4. Inst. 168.
Crom. Jur. 125.
2. Hale 32.
For the form of the commission of gaol delivery. vide appendix to 4th commentary. Sect. 2.

As to **THE SECOND POINT, viz.** What jurisdiction justices of gaol-delivery have by the common law.

Sect. 2. It seems to be clear, That they may by common law proceed upon any indictment of felony or trespass, found before other justices, against any person in the prison mentioned in their commission, and not determined; and therefore these words in the statute of 4. Edw. 3. c. 2. "that the justices assigned to deliver the gaols shall have power to deliver the same gaols of those that shall be indicted before justices of the peace," seem only to be in affirmance Sum. 158.
2. Hale, 329.
33.
4. Inst. 168;
169.
B. Cor. 176;
121 Geo. 884.

firmance of the common law. And herein the authority of these justices differs from that of justices of *oyer and terminer*; who regularly can proceed only against persons indicted before themselves, as hath been more fully shewn in the precedent chapter, section 32.

(a) Cro. Eliz.

90. 179.

B. Commiss.

24.

1. And. 111.

F. Cor. 47.

(b) 1 And.

111, 112.

Sum. 158.

2. Hale 34.

4. Inst. 168.

Sec. 3. But it is said in some (a) books, that justices of gaol-delivery, as such, have no power to take any indictment. But the common opinion, that they have such power, seems much more agreeable to reason; for (b) surely it cannot but be implied in their commission to deliver prisoners of their prisoners, that they must have authority to make such deliverance by due course of law, which cannot be without a proclamation if there be no prosecution, or a proper trial if there be one, in order to which there must be an accusation of record, without which the prisoner cannot be arraigned or tried.

(c) S. P. C.

183.

2. Roll. 12.

Crom. Jur.

28.

F. Cor. 47.

1. And. 111.

Sec. 4. Also it hath been (c) holden, That justices of gaol-delivery, as such, have no power to deliver the gaol of persons committed for high treason; perhaps for this reason, because this being a crime of so high a nature, and against the king himself, shall not be included in the general words of a commission, nor tried without the king's special direction. And this opinion seems to be much favoured by the preamble of the statute of 3. Hen. 5. c. 7. wherein it is recited, "That the punishment of counterfeiting money (which is a species of treason) pertaineth not to any judges of the realm, but to the king's justices before himself, or to special commissioners thereto assigned;" and thereupon it is enacted, "That justices of assize shall have power by the king's commission to hear and determine the offence abovementioned." Yet the contrary opinion is not only warranted by very great (d) authorities, but also it seems more agreeable to reason; for since the words of the commission are general, and include all prisoners alike without any exception, why should those who are accused of treason be construed to be out of the meaning of them more than others? especially considering, that the greater the crime is for which a man is imprisoned, the greater hardship it is for him to lie under the terror of a prosecution for it, without being admitted to an opportunity of clearing his innocence; and the statute of 1. Edw. 6. c. 7. which authorizes subsequent commissioners of gaol-delivery to give judgment of death against such as were found guilty before other commissioners of gaol-delivery, of treason, &c. and relieved before judgment, clearly supposes such justices to have power in treason as well as in other cases.

(d) 4. Inst.

169.

Sum. 159.

2. Hale 35.

1. And. 112.

Part sect. 4.

Sect. 5. It seems clear from the words of the commission, *F. Cor. 77.* that these justices have nothing to do with any persons not in custody of the prison mentioned in it; except in some special cases; for if part only of those who were accomplices to the same felony be in such prison, and other part of them out of it; such justices, for the necessity of the case, may receive an appeal against those who are out of the prison, as well as those who are in it; which appeal, after the trial of such prisoners, shall be removed into the king's bench, and process shall issue from thence against the rest. But if those out of prison should be omitted in such appeal, they could never be put into any other, because there can be but one appeal for one felony. Also it is said both by *(a) Staunford* *(a) S.P.C. 64;* and *(b) Hale*, that such justices may receive an appeal by *65. 159, 160.* bill against to one let bail. But I cannot find any authority *(b) Sum. 179.* in the *(c)* books cited by them for that purpose, to warrant *Over 231.* this opinion *(1)*; for though it be true, that the court of king's bench may receive an appeal by bill, against one for whom bail is filed, as being in *custodiâ marſchalli*, yet this seems to depend on the particular usage of that court. And I do not find it said in any book, that those who are bailed by any other court, are looked upon as prisoners in the prison belonging to such court, but only in the custody of their sureties, who may detain them wherever they please. However, it seems to be agreed by all the books abovementioned, that such justices have no more to do with one let to mainprize, than if he were at large, because such person can in no sense be said to be a prisoner, since it is not in the power of his sureties to detain him in their custody, as will be more fully shewn in the chapter concerning Bail.

(1) It is said; *2. Hale 38.* that justices of gaol-delivery may receive an appeal by bill against a person being in custody; and take an indictment against one admitted to bail, for which *21. Hen. 7. 33. a. 9. Edw. 4. 2. a. 39. Hen. 6. 27. b.* are cited as authorities.

Sect. 6. It seems clear, that such justices have not only power to discharge such prisoners as upon their trial shall be acquitted; but also all such against whom, upon proclamation made, no evidence shall appear to indict them; which neither justices of peace nor justices of *oyer and terminer* can do.

By *14. Geo. 3. c. 20.* he shall pay no fee for such discharge, but the gaoler shall receive *13s. 4d.* from the county.

Sect. 7. Also there seems to be no doubt, but that the justices of gaol-delivery may award execution against such prisoners as have been outlawed for felony before justices of peace.

Dyer 205.
Sum. 160.
2. Ea. c. 35.

Sec. 8. Also notwithstanding the commission of justices of gaol-delivery be in strictness determined after the end of their session, yet it seems to be settled at this day, that they have power either to order the execution or reprieve of the persons who have been condemned before them.

Con. Crom.
Jur. 126.
Quære S.P.C.
132. 77.
25. E. 3. 39.

Sec. 9. Also it is said by some, that justices of gaol-delivery may by the common law punish those who unduly bail prisoners, as being guilty of a negligent escape; but it seems needless strictly to examine this matter, since they have certainly such power by statute, as will be more fully shewn in the following part of this chapter.

As to THE THIRD POINT, viz. What jurisdiction justices of gaol-delivery have by statute, I shall consider the same.—First, In relation to appellees. Secondly, To irregular bailment of prisoners. Thirdly, To sheriffs, &c. refusing to receive prisoners. Fourthly, To persons convicted before former justices. Fifthly, to offences created by statute.

1. Hale 36.

Sec. 10. To the first particular, it is enacted by 28. Edw. 1. “ That they may award process into, &c. foreign county against those who shall be appealed before them “ by an approver;” as shall be more fully shewed in the chapter concerning Approvers.

Sec. 11. As to the second particular, viz. The power of such justices in relation to the bailment of prisoners, it is enacted by 27. Edw. 1. c. 3. commonly called the statute *de finibus*, “ that justices of assize shall deliver the gaols of “ counties where they take assizes, &c. and inquire if sheriffs, or any other, have let out by replevin prisoners not “ repleviable, or have offended in any thing contrary to “ the form of the statute of *Westminster the first*, c. 15. “ and whom they shall find guilty, they shall chasten and “ punish in all things according to the form of the statute “ aforesaid.”

F. N. B. 251.
Sum. 158.
4. Inst. 169.

Sec. 12. But this statute mentioning only justices of assize, it may perhaps be questioned, whether it is to be extended by equity to justices of gaol-delivery by special commission, not being justices of assize.

Sec. 13. However, it is enacted by 4. Edw. 3. c. 2. “ that justices assigned to deliver gaols, shall have power “ to enquire of sheriffs, gaolers, and others in whose ward “ persons indicted before wardens of the peace shall be, if “ they

“ they make deliverance, or let to mainprize any so indicted which be not mainpernable, and to punish the said sheriffs, gaolers, and others, if they do any thing against this act.”

Sec. 14. It is observable, that this statute saith only in general, that such justices shall have power to punish the offenders therein mentioned, without saying, that they shall punish them according to the form of the statute of *S. P. C. 77. Westminster the first*, as the abovementioned statute *de finibus* does; yet it is said, that they may punish them according to the form of the said statute of Westminster, as much as if it had been expressed.

Sec. 15. Also it is enacted by 1. & 2. Ph. & Mary, c. 13. “ that if any justice of the peace of the *quorum*, or coroner, shall offend against the purview of the said statute, either as to bailing prisoners, or taking their examinations, or the information of those that bring them before them, or not putting the same in writ, or not certifying them to the next gaol-delivery, or not putting in writing the evidence given to a jury on a coroner’s inquest of murder or manslaughter, or not binding over material witnesses against persons accused of felony to give evidence at the next general gaol-delivery, or not certifying such evidence and also such recognisances, &c. the justices of gaol-delivery of the place where such offence shall be committed, upon due proof thereof by examination before them, shall for every such offence let such fine as they shall think meet, &c.” 3. Bull. 113.

Sec. 16. As to the third particular, *viz.* The power of such justices in relation to sheriffs, &c. refusing to receive prisoners, it is enacted by 4. Edw. 3. c. 10. “ that justices of gaol-delivery shall punish sheriffs and gaolers refusing to take felons into their custody from constables and townships without being paid for such receipt.”

Sec. 17. As to the fourth particular, *viz.* The power of such justices in relation to persons convicted before former justices, it is enacted by 1. Edw. 6. c. 7. “ that where any person or persons shall be found guilty of any treason or felony, for the which judgment of death should or may ensue, and shall be reprieved to prison without judgment at that time given against him, her, or them to be found guilty, those persons that at any time hereafter shall by the king’s letters patent be assigned justices to deliver the gaol where any such person or persons found guilty shall remain, shall have full power and authority “ to 4. Inst. 691.

Vide also their power as to transportation, 1. vol. &c.

"to give judgment of death against such person so found guilty, and reprieved, as the same justices (before whom such person or persons was or were found guilty) might have done, if their commission of gaol-delivery had remained and continued in full force and strength."

12. Co. 33.
B. Oy. & Ter.

Seft. 18. It hath been holden that this statute extends not to convictions before justices of *oyer* and *terminer*, not only because convictions before justices of gaol-delivery only are mentioned, but because the proceedings before justices of *oyer* and *terminer*, after the *oyer* determined, ought to remain in the king's bench, and the records before the justices of gaol-delivery with the *custos rotulorum*.

Dalison 20.

Seft. 19. Also it seemeth, that since the statute speaks only of persons reprieved before judgment, it gives subsequent commissioners no manner of power over persons condemned by former justices; and therefore it hath been holden, that if a person condemned by former justices, plead a pardon before their successors, they have no power to allow it, but that the record ought to be removed by *certiorari* into the king's bench, and the prisoner also by *habeas corpus*, and that there the pardon shall be allowed or disallowed. And from the same reason it seems to follow, that subsequent justices have no (*a*) power from this statute to award the execution of persons condemned by former justices and reprieved by them. But if judgment had not been given by the former justices, there is no doubt but that the subsequent ones might by force of this statute have allowed the pardon, or given judgment, and awarded execution, &c. as the first might have done, (*b*). Also it hath been adjudged, that not only such subsequent justices as are authorised by the same king, by whom the former were commissioned, but also that the justices of the next king may have the like power by virtue of this statute.

Quære Dyer
165.

(*a*) 2. Hale
35. contra.

(*b*) See the
Statutes 6.
Geo. 1. c. 23.
and 8. Geo. 3.
c. 15. post ch.
33. title
TRANSPOR-
TATION.
7. Co. 31.
Dalison 20.

Seft. 20. As to the fifth particular, *viz.* The jurisdiction of justices of gaol-delivery in relation to offences created by statute. By 33. Hen. 8. c. 9. f. 20. they may punish those who keep unlawful gaming-houses, or use unlawful games. By 5. Eliz. c. 9. f. 9. they have jurisdiction over perjury and subornation of perjury against the form of that statute. By 8. Eliz. c. 3. they may punish those who transport sheep alive. By 23. Eliz. c. 1. f. 9. they may enquire of, hear, and determine offences against that statute in not coming to church; and generally they have the like power in other statutes creating new offences, which it would be too tedious particularly to set down in this place.

Seft.

Sec. 21. As to THE FOURTH GENERAL POINT of this chapter, viz. In what place justices of gaol-delivery ought to hold their sessions, it is enacted by 6. Rich. 2. c. 5. "that justices assigned to take assizes and deliver gaols, "shall hold their sessions in the principal and chief towns "of every of the counties where the shire courts of the "same counties were then holden, or hereafter should be "holden." For other matters relating to these justices, see chapter 7. concerning Justices of Assize and *Nisi Prius*, and the chapter concerning Process. Vide 19. Geo. 3. c. 74. s. 70. Post. c. 7. s. 20.

See the precedent chap. sect. 4, and the 25th sect. of this chapter.

Seet. 6. As to THE SECOND PARTICULAR, viz. The power of these justices in relation to counterfeiters of money, it is recited by the statute of 3. Hen. 5. c. 7. "that counterfeiting, clipping, washing, and other falsity of money, had then of late abounded, for that the punishment of the same pertaineth not to any judges of the realm, but to the king's justices before himself, or special commissioners thereto assigned, &c." and thereupon it is enacted, "that the king's justices assigned to take assizes in all the counties of England, shall have power, by the king's commissions, to hear and determine in their sessions, as well of the counterfeiting and of the bringing such false money into the realm, as of clipping, washing, and every other falsity of the said money."

S. P. C. 58.
Summary 164.

Seet. 7. It seems clear from the manifest purport of this statute, that *justices of assize* can claim no power from it over any of the offences therein mentioned, without a special commission for such purpose; but this statute being wholly in the affirmative, and no way intended to abridge but enlarge the jurisdiction of such justices; it seems clear, that if they had authority as justices of gaol-delivery by virtue of the above-mentioned statute *de finibus*, without any special commission to deliver persons in prison for such crimes (which question is more fully handled in the precedent part of this chapter), they may still lawfully proceed upon the said statute in the same manner as before.

Supra, Sect. 4.
Crom. Jur.
126.

Seet. 8. As to THE THIRD PARTICULAR, viz. The power of *justices of assize* in relation to appellees, it is enacted by the 28. Edw. 1. commonly called the statute *de appellatis*, "that such justices may award process into any foreign county against persons appealed by approvers, and proceed against them, &c."

Dyer 99.
Pl. 62.
12. Co. 32.
Stamf. 159.
Co. Lit. 263.

Seet. 9. It is made a doubt in *Dyer's Reports*, by what warrant *justices of assize* hold plea of an appeal of robbery; and it is there holden, that they do it by virtue of the commission of gaol delivery. But it seems, that it ought not to be intended to be the meaning of this report, that *justices of assize* have no jurisdiction as to an appeal of robbery, without an express commission of gaol-delivery; for since *justices of assize*, as such, have power by the above-mentioned statute *de finibus* to deliver gaols of all manner of prisoners, after the form of the gaol-deliveries of the shires wherein they sit, why should they not by force of those general words deliver such gaols of persons proceeded against by way of appeal commenced before them, as well as of those proceeded against by way of indictment, as it seems to be taken

taken for granted in other books that they may? And therefore it seems to be reasonable to take the abovementioned report of *Dyer* in this sense, that *justices of assize* may hold plea of appeals of robbery by the commission of gaol-delivery, given them implicitly by the said statute *de finibus*, in respect whereof they seem to have all the power of justices of gaol-delivery, whether given them by the common law or by statute, as fully appears from what immediately follows the abovementioned passage in the said report, wherein it is said, that “the statute of 3. Hen. 7. c. 1. gives justices of assize the power by express words as to appeals of death;” but it is certain, that the said statute of *Henry the seventh* does not expressly mention *justices of assize*, but saith only, “that the wife, &c. may commence an appeal before the sheriff and coroners, or before the king in his bench, or justices of gaol-delivery;” and yet it is holden in the said report, that this statute expressly extends to *justices of assize*; from which it seems manifestly to follow, that such justices are taken to be included under the general notion of justices of gaol-delivery.

22. Ed. 4. 19.
a B. appeal,
113.
4. Inst. 159.

Dyer 99.

13. Co. 32.
4. Inst. 159.

Sec. 10. As to THE FOURTH PARTICULAR, viz. The power of *justices of assize* in relation to conspirators, maintainers, and other offenders of the like nature, it is enacted by 28. Edw. 1. c. 10. commonly called *Articuli super chartas*, “that justices assigned to take assizes, when they come in to the county to do their office, shall upon every plaint made unto them of conspirators, false informers, and evil procurers of dozens, assises, inquests and juries, award inquest thereupon without writ, and shall do right to the plaintiffs without delay.”

And by 4. Edw. 3. c. 11. it is further enacted, “that the justices of assize, whensoever they come to hold their sessions or to take inquest upon *nisi prius*, shall inquire, hear, and determine, as well at the suit of the king as at the suit of the party of maintainers, bearors, conspirators, &c.”

And the like is ordained by 20. Edw. 3. c. 6. by which it is enacted, “that such justices shall have commissions to inquire of maintainers and common embraceors, &c.”

Sec. 11. Also by 5. Edw. 3. c. 10. it is enacted, “that the justices before whom any assize, inquest, or jury shall pass, may inquire and determine the offence of any juror in taking money of either party, &c.”

Register 188.

Stat. 12. But by 38. Edw. 3. c. 12. it is ordained,
 “ that no justice &c. inquire of offences of the said offence,
 “ but only at the suit of the party, or of other, &c.”

Stat. 13. And by 32. Hen. 8. c. 9. it is further enacted,
 “ that the *justices of assize* of every circuit within this
 “ realm, and elsewhere within the king’s dominions, shall
 “ in every county within their circuits, twice in the year
 “ cause open proclamation to be made, as well of the
 “ said statute as of all others made against unlawful main-
 “ tenance, champerty, embracery, &c.”

Stat. 14. As to THE FIFTH PARTICULAR, *viz.* The
 power of *justices of assize* in relation to the offences of the-
 riffs, gaolers, and other officers, it is enacted by 20. Edw. 3.
 c. 6. “ that justices of assize shall have commissions suf-
 “ ficient to enquire of the riffs, elcheators, bailiffs of fran-
 “ chises and their ministers, and of the gifts which they
 “ take to execute their office, &c.”

Stat. 15. Also by 23. Hen. 6. c. 10. it is enacted,
 “ that *justices of assize* in their sessions shall have power
 “ to inquire, hear, and determine of offences without special
 “ commission, of and upon all the riffs, under-the riffs, clerks,
 “ bailiffs, gaolers, coroners, stewards, bailiffs of franchises,
 “ or any other officer or minister doing contrary to the said
 “ statute, as by extorting money for the omitting of an ar-
 “ rest, or showing ease or favour to those who shall be ar-
 “ rested, or by admitting persons to bail, or denying them
 “ the benefit of it, contrary to the form of the said statute.”

Stat. 16. Also, by 1. Hen. 8. c. 7. it is enacted, “ that
 “ *justices of assize* and of the peace shall have authority to
 “ inquire of and determine, as well by examination as by
 “ presentment, the default of coroners, in not taking an in-
 “ quest without fee or reward, on the view of the body of
 “ any person slain by misadventure.”

1. Hale 360.
 2. Hale 403.
 Kaym. 67.

Stat. 17. As to THE SIXTH PARTICULAR, *viz.* The
 power of *justices of assize* in relation to capital offences
 tried by writ of *nisi prius*, it is enacted by 14. Hen. 6.
 c. 1. “ that the justices before whom inquisitions, inquests,
 “ and juries, shall be taken by the king’s writ of *nisi prius*,
 “ shall have power in all cases of felony and treason to
 “ give their judgments, as well where a man is acquitted of
 “ felony or of treason, as where he is thereof attainted, the
 “ day and place where the said inquisitions, inquests, and
 “ juries be so taken, and then from thenceforth to award
 “ execution to be made by force of the same judgments.”

Stat.

SECT. 18. In the construction of this statute it hath been holden, that if the plaintiff in appeal be nonsuited before justices of *nisi prius*, they have no power to arraign the defendant at the suit of the king on the declaration in the appeal, as justices before whom an appeal is originally commenced may do. And the reason of this construction seems to be this, because the statute only mentioning that justices of *nisi prius* shall give judgment where the defendant is acquitted or attainted, leaves their jurisdiction upon a nonsuit as it was before. But it seems certain, that on the acquittal of an appellee such justices have power to inquire of the abettors, and also of the sufficiency of the plaintiff to answer the damages; for since the statute of *Westminster the second*, ch. 12. gives such power to the justices before whom an appeal shall be heard and determined; and now by force of 14. Hen. 6. it may be heard and determined before justices of *nisi prius*, it seems necessarily to follow, that justices of *nisi prius* shall have such power since the same statute of 14. Hen. 6. And from the same reasoning it seems also to follow, that such justices may give judgment for the damages; but constant experience hath overruled it to the contrary.

22. Ed. 4. 19. a.
2. Hale 41.
403.
Dyer 120.
Crom. Jur.
212.
4. Inst. 160.
22. Ed. 4. 19.
10. Ed. 4. 14.
2. Inst. 386.
Bro. Nisi
Prius, 27.
2. Hale 32.

As to THE SEVENTH PARTICULAR, viz. For what counties justices of assize may be commissioned.

SECT. 19. It is enacted by 8. Rich. 2. c. 2. "that no man of law shall be from thenceforth justice of assize, or of the common deliverance of gaols, in his own county."

SECT. 20. Also it is enacted by 33. Hen. 8. c. 24. "that no justice, nor other man learned in the laws of this realm, shall use nor exercise the office of justice of assize within any county where the said justice was born, or doth inhabit, on pain of one hundred pounds, &c. Provided, that the said act shall not extend to any person who shall be clerk of assizes, and associate to any justice of assize, nor to any mayor, sheriff, recorder, steward, bailiff, sewer, or other officer being born or dwelling within any city, borough or town within this realm of England, &c. nor to justices of either bench for taking, hearing, or determining assizes in the one bench or the other, nor to the justices, justice-clerk or clerks, of assizes in the duchy and county palatine of Lancaster."

† *SECT. 21.* These two acts of *Richard the Second* and *Henry the Eighth* are explained and amended by 21. Geo. 2. c. 27. by that it is enacted, "that the justices of either bench, the barons of the exchequer, or any other persons learned in the law, who shall be appointed justices of oyer and

4. Comm. 268.

“ *terminer* or gaol-delivery in any county ~~in England~~, may
 “ use and exercise the said offices of *oyer and terminer* and
 “ gaol-delivery in such county, notwithstanding they or
 “ any of them shall have been born and do inhabit within
 “ any such county, without incurring the penalty of one
 “ hundred pounds imposed by 33. Hen. 8.”

† *Sett.* 22. And by 19. Geo. 3. c. 74. s. 79. “ it is fur-
 “ ther enacted, “ that wherever the courts of assize, *nisi prius*,
 “ *oyer and terminer*, or gaol-delivery, for any county at large
 “ in *England*, shall be held in or near any city or town that
 “ is also a county of itself, and at the same time with the
 “ like or any of the like courts for the said city or town,
 “ the lodgings of the judge or judges shall be construed and
 “ taken to be situate both within the county at large, and
 “ also within the county of such city or town, for the pur-
 “ pose of transacting the business of the assizes for such
 “ county at large, and for the county of such city or town,
 “ during the time such judges shall continue therein for the
 “ execution of their several commissions.”

Vide 14. Hen. 6. c. 3. for holding assizes at Carlisle for the county of Cumber-
 land; the 1. Geo. 1. c. 45. for Cornwall; and 21. Geo. 2. c. for Buckingham.”

CHAPTER THE EIGHTH.

OF

THE COURT

OF

CONSERVATOR OF THE PEACE.

CONSERVATORS OF THE PEACE, by the *common law*, St. Tr. 317. were of two sorts, **FIRST**: Those who, in respect of their offices, had power to keep the peace, but were not simply called by the name of "*conservators of the peace*," but by the name of such offices, **SECONDLY**, Those who were constituted for this purpose only, and were simply called by the name of *conservators* or *wardens of the peace*.

SECT. 1. Of the first sort, **THE KING** (*a*) is certainly the principal, from whom all authority of this kind was originally derived, and who still continues to have the same in his own person. Yet it is said, (*b*) that he cannot take a recognizance for the keeping of the peace, because it is a rule in law, that no one can take any recognizance, who is not either a justice of record, or by commission. Also it seems certain, that (*c*) no duke, earl, or baron, as such, have any greater authority to keep the peace than mere private persons.

(*a*) Lamb. b. 1. c. 3.
Dalt. c. 1.
(*b*) B. Recog. 14. 19.
Dalt. c. 1.

(*c*) Lamb. b. 1. c. 3.

SECT. 2. The (*d*) lord chancellor or lord keeper of **THE GREAT SEAL**, the lord high steward of *England*, the lord marshall, and lord high constable of *England*, and every justice of the king's bench, and, as some say, the lord treasurer, have, as incident to their offices, a general authority to keep the peace throughout all the realm, and to award process for the surety of the peace, and to take recognizance for it. And the master of the rolls hath also the like power, either as incident to his office, or at least by prescription. † But neither *privy counsellors* nor *secretaries of state* are conservators of the peace.

(*d*) Dalt. c. 1.
Lamb. b. 1.
c. 3.
Crom. 6.
1. Leon. 70.
71.

2. Wils. 289.

SECT. 3. Also every court of record, as such, hath power to keep the peace within its own precinct, as hath been more fully shewn ch. 1. sect. 15. And the justices of gaol-delivery may take surety of the peace from a prisoner before them, who was committed for not finding such surety.

10. H. 6. 7.
Lamb. b. 1. c. 3.

(a) Lamb. b. 1. *Sec. 4.* Also every SHERIFF is a principal ^(a) conservator of the peace within his county, and may without doubt, *ex officio*, award process of the peace, and take surety for it. And it seems the better (b) opinion, that the security so taken by him is by the common law looked on as a recognizance or matter of record, and not as a common obligation or matter *in pais* only; for that it is taken by him by virtue of the king's commission, by which he is intrusted with the custody of the county, and consequently has by it an implied power of keeping the peace within such county, and it is a general (c) rule, that whatsoever is done by virtue of the king's commission ought to be taken as a matter of record.

(d) Crom. 6. *Sec. 5.* Also every (d) CORONER is another principal conservator of the peace within the county of which he is coroner, and may certainly bind any person to the peace who makes an affray in the presence. But it seems the better opinion, that he hath no authority to grant process for the peace; and it seems clear, that the security taken by him for the keeping of the peace (except only where it is taken by him as judge of his own court for an affray done in such court), is not to be looked on as a recognizance, but as an obligation; because it is not taken by one who acts as a judge of record, or by the king's commission, as all (e) recognizances ought to be.

(e) See the Books cited S. 1. Letter b. and S. 4. Letter b.

Crom. 6. *Sec. 6.* Also every *high* and *petit* CONSTABLE are by the common law conservators of the peace within their several limits, and may take such order for the keeping of the same, as hath been more fully shewn book 1. chap. 63. sect. 13, 14, &c.

1. Comm. 34. 9. *SECONDLY*, Conservators of the peace by the common law who were constituted for that purpose only, and were simply called by the name of *conservators* or *keepers of the peace*, were of two kinds—Ordinary, and Extraordinary.

Those of the first kind were either *by tenure*, or *by election*; or *by prescription*.

Co. Lit. 106. *Sec. 7.* CONSERVATORS OF THE PEACE *by tenure* were those who held lands of the king by this service, among others, of being *conservators of the peace* within such a district.

49. Hen. 3. *Sec. 8.* CONSERVATORS OF THE PEACE *by election* were those who were chosen to such office in pursuance of the king's writ to such purpose (as all sheriffs anciently were,

Lamb. b. 1. c. 3. 12.

4. Ind. 174.

were, and as ~~to~~ ^{to} ~~now~~ ^{now} ~~are~~ ^{are}, by the freeholders of a county in the county court, after which election it was usual for the king to send another writ to the persons so chosen, commanding them diligently to attend their said office till they should receive a command from the king to the contrary.

Sec. 9. CONSERVATORS OF THE PEACE *by prescription* B. Peace 18.
were those who claimed such power from an immemorial Prescrip. 79.
usage in themselves and their predecessors or ancestors, or 22. Ed. 4. 35.
those whose estate they had in certain lands, to exercise the Lamb. b. 1. c. 3.
like power, which wholly depended upon such usage, both as to its extent and the manner in which it was to be exercised.

Sec. 10. It is (a) questioned indeed by some, whether (a) 21. Ed. 4.
any such power can be claimed by usage? Yet if the power 67.
of holding pleas, and even courts of record, which are of Bro. Peace 18.
so high a nature, and imply a power of keeping the peace 3. Bac. Ab. 286.
within their own precincts, may be claimed by usage, as it 4. Lco. 149.
seems to be (b) certain that they may, it seems strange that (b) Co. Lit.
the bare authority of keeping the peace in a certain district 114.
may not as well be claimed by such usage. D. S. 1. c. 7.

Sec. 11. It (c) seems, that the power of such conser- (c) Dalt. b. 1.
vators of the peace, whether by tenure, election, or pre- f. 3.
scription, was no greater than that of constables at this day, Crom. 6.
unless it were enlarged by some special grant or prescription.

Sec. 12. THE EXTRAORDINARY CONSERVATORS OF Lamb. b. 1.
THE PEACE were persons specially commissioned, in times c. 3.
of imminent danger either from rebels or foreign invaders, to take care of and defend such a particular district committed to their charge, and to preserve the peace within the limits of it; and these had power to command the sheriff with his whole *posse* to aid and assist them.

CHAPTER THE EIGHTH,

CONTINUED.

OF

THE COURT

OF

JUSTICES OF THE PEACE.

27. Hen. 8. c. 4. † JUSTICES OF THE PEACE are of three sorts. FIRST, Dalton 3. By act of parliament, as the *Bishop of Ely* and his successors; the *Archbishop of York*; and the *Bishop of Durham*. 4. Conn. Dig. SECONDLY, By charter or grant, made by the king under the great seal; as the mayors and chief officers in corporate towns. And THIRDLY, By commission. 8vo edit. 524.

For the better understanding whereof I shall consider,

1. In what manner justices of the peace have been ordained by the several statutes.
2. How they are to be commissioned in pursuance of those statutes.
3. In what manner they are to be qualified.
4. In what manner justices of the peace shall take the oaths of office.
5. Who are incapable of acting as justices of the peace.
6. What statutes concerning the peace may be executed by such justices.
7. How far the justices of peace for a county may act out of it, or within a liberty.
8. What commissions of this kind require a special suit to the king for granting them.
9. How far such justices have power to proceed on indictments not taken before themselves.
10. By what name they are to be described.

11. What

11. What authority they have in relation to *felonies*.
12. What authority they have in relation to treason, *præmunire*, and misprision of treason.
13. What authority they have in relation to *inferior offences*.
14. In what cases they may act, although they are interested.
15. How far they are impowered to administer oaths.
16. How far they may act though not of the *quorum*.
17. How far they are protected in the discharge of their duty.
18. How far they may award costs.

I. In what manner justices of the peace have been ordained.

Stat. 1. The first statute is 2. Edw. 3. c. 16. which is in the following words:—"For the better keeping and maintenance of the peace, the king willeth that in every county, good men and lawful, which be no maintainers of evil, or barrators in the country, shall be assigned to keep the peace." Lamb. 20.
4. Comm. 179.
Salk. 406.
4. St. Tr. 561.
2. Hale 44.

Stat. 2. And it is farther enacted by 4. Edw. 3. c. 2. "that there shall be assigned good and lawful men in every county to keep the peace; and at the time of the assignments mention shall be made, that such as shall be indicted or taken by the said keepers of the peace, shall not be let to mainprise by the sheriffs, nor by none other ministers, if they be not mainpernable by the law; nor that such as shall be indicted, shall not be delivered but at the common law. And the justices assigned to deliver the gaols shall have power to deliver the same gaols of those that shall be indicted before the keepers of the peace; and that the said keepers shall send their indictments before the justices, &c."

Stat. 3. By 18. Edw. 3. c. 2. "Two or three of the best reputation in the counties shall be assigned *keepers of the peace* by the king's commission. And at what time need shall be, the same, with other wise and learned in the law, shall be assigned by the king's commission to hear 1. Roll. Ab.
95.
infra, 32.

“ hear and determine felonies and trespasses done against the
 “ peace in the same counties, and to inflict punishment
 “ reasonably according to the law and reason, and the man-
 “ ner of the deed.”

10. St. Tr. 92.
 App.

Stat. 4. By 34. Edw. 3. c. 1. “ In every county of
 “ *England* shall be assigned, for the keeping of the peace,
 “ one lord, and with him three or four of the most worthy
 “ in the county, with some learned in the law, and they
 “ shall have power to restrain the offenders, rioters, and all
 “ other barrators, and to pursue, arrest, take, and chastise
 “ them according to their trespass or offence, and to
 “ cause them to be imprisoned and duly punished accord-
 “ ing to the laws and customs of the realm, and according
 “ to that which to them shall seem best to do by their
 “ discretion and good advisement; and also to inform them,
 “ and to inquire of all those who have been pillors and rob-
 “ bers in the parts beyond the sea, and be now come again,
 “ and go wandering, and will not labour as they were wont
 “ in times past; and to take and arrest all those that they
 “ may find by indictment, or by suspicion, and to put them
 “ in prison; and to take of all them that be not of good
 “ fame, where they shall be found, sufficient surety and
 “ mainprize of their good behaviour towards the king and
 “ his people, and the other duly to punish, to the intent
 “ that the people be not by such rioters or rebels troubled
 “ nor endamaged, nor the peace blemished, nor merchants
 “ nor others passing by the highways of the realm disturbed,
 “ nor put in the peril which may happen of such of-
 “ fenders; and also to hear and determine at the king’s suit,
 “ all manner of felonies and trespasses done in the same
 “ county, according to the laws and customs aforesaid.”

12. Rich. 2. 2.
 13. Rich. 27.

Stat. 5. By 17. Rich. 2. c. 10. “ In every commission
 “ of the peace through the realm, where need shall be, two
 “ men of law of the same county where such commission
 “ shall be made, shall be assigned to go and proceed to the
 “ deliverance of thieves and felons, as often as they shall
 “ think it expedient.”

Stat. 6. And by 2. Hen. 5. ft. 1. c. 4. “ The jus-
 “ tices of peace in every shire named of the *quorum* (except
 “ lords and justices of either bench, and the chief baron,
 “ and serjeants at law, and the king’s attorney for the
 “ time that they shall be occupied in the king’s service),
 “ shall be resident in the same shire.

Stat. 7. Also by 2. Hen. 5. ft. 2. c. 1. “ Justices of peace
 “ shall be made in the counties of *England*, of most sufficient
 “ persons

“ persons dwelling in the same counties, by the advice of (a) The power of chancery extends only to putting them in, but has no right to punish them afterwards for misbehaviour; the redress is to move the king's bench for an information, and afterwards the complainants may apply to chancery to turn them out of the commission. 2. Atk. 2, 4. St. Tr. 705.

“ THE CHANCELLOR (a) and of the king's council, without taking other persons dwelling in foreign counties to execute such office, except the lords and the justices of the king and his council; and except all the king's chief stewards of the lands and feignories of the duchy of Lancaster, in the north parts, and in the south, for the time being.”

to move the king's bench for an information, and afterwards the complainants may apply to chancery to turn them out of the commission. 2. Atk. 2, 4. St. Tr. 705.

Sec. 8. Also there are many other statutes concerning the power of justices of the peace, all of which it would be endless to enumerate; therefore I have only taken notice of those which concern their authority in general; and for those which concern the particular branches of it, I shall refer the reader to the books which treat principally of this subject.

II. How justices of peace are to be commissioned in pursuance of the above statutes.

It is observable, that the commission of the peace hath often been altered in several reigns, and that the present form of it was settled by the judges about the thirty-third year of *Queen Elizabeth*, and is in substance as followeth: 2. Hale 42. 43, 4. Inst. 171. Lamb. b. 1. c. 9, 3. Burn 7. Dalt. 5.

Sec. 9. Beginning with a salutation from the king to the several persons named in it, it afterwards assigns them and every one of them, jointly and severally, the king's justices to keep the peace in such a county; and to cause to be kept all statutes made for the good of the peace and quiet government of the people, as well within liberties as without; and to punish all those who shall offend against any of the said statutes; and to cause all those to come before them, or some of them, who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the peace of good behaviour; and if they shall refuse to find such surety, to cause them to be kept safely in prison till they shall find it. For the precedent of a modern commission of the peace, vide 3. Burn's Justice, 7.

Sec. 10. Then it goes on and assigns them, and every two or more of them (of which number either such or such a particular person among them is specially required to be), justices to inquire by the oath of good and lawful men of the same county, of all felonies, witchcrafts, enchantments, forceries, magick art, trespasses, foreclosures, regrators, ingrossers, and extortions whatsoever, and of all other offences of which justices of the peace may lawfully enquire; also of all those who shall go or ride armed, &c. or in companies, Vide Dalton c. 6. 3. Burn 9. 2. Hale 46.

panies, to the disturbance of the peace; and also of all innholders and others who shall offend in the abuse of weights or measures, or selling of victuals, &c. and also of all sheriffs, bailiffs, stewards, constables, gaolers, and other officers, who shall be faulty in the execution of their offices; and to inspect all indictments taken before them, or any of them, or other former justices of the peace for the same county; and to make and continue process against all the persons so indicted, till they shall be taken, or render themselves, or be outlawed; and to hear and determine all the felonies, and other offences aforesaid: Provided, that if a case of difficulty shall arise, they shall not proceed to give judgment, except in the presence of some justice of one of the benches or of assize.

Stat. 11. And then it commands them to make inquiries of the premises, and to hear and determine the same at certain days and places, which they or any such two or more of them shall appoint.

Stat. 12. And then it goes on and commands the sheriff of the county to return before them at certain days and places, to be made known to him by them, such and so many lawful men of his bailiwick, by whom the truth of the premises may be best known and inquired.

Stat. 13. And then concludes by assigning some one of them keeper of the rolls of the peace in the same county; and commanding him to cause to be brought before himself and his fellows, at the said days and places, the writs, precepts, processes, and indictments aforesaid.

III. In what manner justices of the peace are to be qualified.

Stat. 14. By the 5. Geo. 2. c. 18. and 18. Geo. 2. c. 20.
 “ No person shall be capable of being a justice of the peace,
 “ or of acting as such for any county, riding, or division
 “ within *England* or *Wales*, who shall not have, either in
 “ law or equity, to and for his own use and benefit, in pos-
 “ session, a freehold, copyhold, or customary estate for life,
 “ or for some greater estate, or an estate for some long term
 “ of years, determinable upon one or more life or lives, or
 “ for a certain term originally created for twenty-one years,
 “ or more, in lands, tenements, or hereditaments, lying or
 “ being in *England* or *Wales*, of the clear yearly value of
 “ one hundred pounds, over and above what will satisfy and
 “ discharge all incumbrances that affect the same, and over
 “ and above all rents and charges payable out of, or in re-
 “ spect

"spect of the same; or who shall not be seised of, or in-
 "titled unto in law or equity, to and for his own use and
 "benefit, the immediate reversion or remainder of and in
 "lands, tenements, or hereditaments, lying or being as
 "aforesaid, which are leased for one, two, or three lives,
 "or for any term of years determinable upon the death of
 "one, two, or three lives, upon reserved rents, and which
 "are of the clear yearly value of three hundred pounds; and
 "who shall not, before he takes upon himself to act as jus-
 "tice of the peace, at some general or quarter sessions for the
 "county, riding, or division for which he does, or shall Oath.
 "intend to act, first take and subscribe the oath following:
 "I A. B. do swear, that I truly and *bona fide* have such an
 "estate, in law or equity, to and for my own use and bene-
 "fit, consisting of (specifying the
 "*nature of such estate, whether messuage, land, rent, tythe, of-*
 "*fice, benefice, or what else)* as doth qualify me to act as a
 "justice of the peace for the county, riding, or division, of
 "according to the
 "true intent and meaning of an act of parliament made in
 "the eighteenth year of the reign of his majesty king George
 "the second, intituled, *an act to amend and render more effec-*
 "*tual an act passed in the fifth year of his present majesty's reign,*
 "intituled, *an act for the further qualification of justices of*
 "the peace; and that the same *(except where it consists of an*
 "*office, benefice, or ecclesiastical preferment, which it shall be*
 "*sufficient to ascertain by their known and usual names)* is lying
 "of being, or issuing out of lands, tenements, or heredi-
 "taments, being within the parish, township, or precinct
 "of or in the several
 "parishes, townships, or precincts of
 "in the county of or in the several coun-
 "ties of ties of
(as the case may be)"

"Which oath so taken and subscribed as aforesaid, shall be Oath to be
 "kept by the clerk of the peace of the said county, riding, recorded.
 "or division for the time being, among the records of the
 "sessions for the said county, riding, or division."

Sect. 15. By 18. Geo. 2. c. 20. s. 2. "Every such Copy of oath
 "clerk of the peace shall, upon demand for that purpose to be given
 "made, forthwith deliver a true and attested copy of the for 2s.
 "said oath in writing, to any person, paying for the same
 "the sum of two shillings and no more; which being and admitted
 "proved to be a true copy of such oath, to be kept amongst in evidence.
 "the records as aforesaid, shall be admitted to be given in
 "evidence upon any issue, in any action, suit, or informa-
 "tion, to be brought upon this act.

Penalty of
100*l*.

Proof of qua-
lification on
the defendant.

Defendant to
specify lands
(not contain-
ed in his oath)
in a written
notice.

Lands not
mentioned,
not to be al-
lowed.

Stat. 16. By 18. Geo. 2. c. 20. f. 3. "From and after
"the said twenty-fifth day of *March*, any person who shall
"act as a justice of the peace for any county, riding, or
"division, within that part of *Great-Britain* called *England*,
"or the principality of *Wales*, without having taken and
"subscribed the said oath as aforesaid, or without being
"qualified according to the true intent and meaning of this
"act, shall, for every such offence, forfeit the sum of one
"hundred pounds; one moiety to the use of the poor of the
"parish in which he most usually resides, and the other
"moiety to the use of such person or persons who shall sue
"for the same, to be recovered, together with full costs of
"suit, by action of debt, bill, plaint, or information, in
"any of his Majesty's courts of record at *Westminster*, in
"which no esoin, protection, wager of law, or more than
"one imparlance shall be allowed; and in every such ac-
"tion, suit, or information, the proof of his qualification
"shall lie on such person against whom the same is brought."

Stat. 17. By 18. Geo. 2. c. 20. f. 4. "If the defendant
"in any such action, suit, or information, shall intend to
"insist upon any lands, tenements, or hereditaments, not
"contained in such oath as aforesaid, as his qualification
"to act as a justice of the peace in part, or in the whole,
"at the time of the supposed offence wherewith he is
"charged, he shall at or before the time of his pleading de-
"liver to the plaintiff or informer, or his attorney, a no-
"tice in writing, specifying such lands, tenements, and
"hereditaments (other than those contained in the said
"oath), and the parish, township, precinct, or place, or
"parishes, townships, precincts, or places, and the county
"or counties wherein the same are respectively situate, ly-
"ing or being (offices and benefices excepted, which it shall
"be sufficient to ascertain by their known and usual names);
"and if the plaintiff or informer in any such action, suit,
"or information, shall think fit thereupon not to proceed
"any further, he may, with the leave of the court, discon-
"tinue such action, suit, or information, on payment of
"such costs to the defendant as the court shall award."

Stat. 18. By 18. Geo. 2. c. 20. f. 5. "Upon the trial
"of the issue in any action, suit, or information, to be
"brought as aforesaid, no lands, tenements, or heredita-
"ments, which are not contained in such oath and notice
"as aforesaid, or one of them, shall be allowed to be in-
"sisted upon by the defendant, as any part of his quali-
"fication."

Stat.

Stat. 19. By 18. Geo. 2. c. 20. f. 6. "Where the lands, tenements, or hereditaments, contained in the said oath or notice, are, together with other lands, tenements, and hereditaments, belonging to the person taking such oath, or delivering such notice, liable to any charges, rents, or incumbrances, that, within the true intent and meaning, and for the purposes of this act, the lands, tenements, and hereditaments, contained in the said oath or notice shall be deemed and taken to be liable and chargeable, only so far as the other lands, tenements, and hereditaments so jointly charged, are not sufficient to pay, satisfy, or discharge the same.

Lands mentioned, how far chargeable with incumbrances.

Stat. 20. By 18. Geo. 2. c. 20. f. 7. "Where the qualification required by this act, or any part thereof, consists of rent, it shall be sufficient to specify in such oath or notice as aforesaid, so much of the lands, tenements, or hereditaments, out of which such rent is issuing, as shall be of sufficient value to answer such rent.

Qualification by rent only.

Stat. 21. By 18. Geo. 2. c. 20. f. 8. "In case the plaintiff or informer in any such action, suit, or information, shall discontinue the same otherwise than aforesaid, or be nonsuit, or judgment be otherwise given against him, that then and in any of the said cases, the person against whom such action shall have been brought, shall recover treble costs.

Treble costs.

Stat. 22. By 18. Geo. 2. c. 20. f. 9. "Only one penalty of one hundred pounds shall be recovered from the same person by virtue of this act, or of an act made in the fifth year of the reign of his present majesty, intituled, *an act for the further qualification of justices of the peace*, for the same, or any other offence committed by the same person; before the bringing of the action, suit, or information, upon which one penalty of one hundred pounds shall have been recovered, and due notice given to the defendant of the commencement of such action, suit, or information; any thing in this or the same act to the contrary notwithstanding.

Only one penalty recoverable by this and 5. Geo. 2. c. 58.

Stat. 23. By 18. Geo. 2. c. 20. f. 10. "Where an action, suit, or information shall be brought, and due notice given thereof as aforesaid, no proceedings shall be had upon any subsequent action, suit, or information against the same person, for any offence committed before the time of giving such notice as aforesaid; but the court where such subsequent action, suit, or information shall be brought, may, upon the defendant's motion,

No subsequent action to be for offences prior to the first action and notice.

"stay

“ stay proceedings upon every such subsequent action; suit,
 “ or information, so as such first action; suit, or informa-
 “ tion be prosecuted without fraud, and with effect; it
 “ being hereby declared, that no action, suit, or informa-
 “ tion, which shall not be so prosecuted, shall be deemed
 “ or construed to be an action, suit, or information, with-
 “ in the intent and meaning of this act.

Limitations of
actions.

Stat. 24. By 18. Geo. 2. c. 20. s. 11. “ Every action,
 “ bill, plaint, or information, given by this or the said for-
 “ mer act, shall be commenced within the space of six ca-
 “ lendar months after the fact upon which the same is
 “ grounded shall have been committed.

Places not
within this
act.

Stat. 25. By 18. Geo. 2. c. 20. s. 12. “ This act, or
 “ any thing herein contained, shall not extend, or be con-
 “ strued to extend, to any city or town being a county of
 “ itself, or to any other city, town, cinque-port, or li-
 “ berty, having justices of the peace within their respective
 “ limits and precincts by charter, commission, or other-
 “ wise; but that in every such city, town, liberty, and
 “ place, such persons may be capable to be justices of the
 “ peace, and in such manner only, as they might have been
 “ if this act had never been made; any thing herein before
 “ contained to the contrary thereof in any wise notwith-
 “ standing.

Persons ex-
cepted.

Stat. 26. By 18. Geo. 2. c. 20. s. 13. “ Nothing in
 “ this act, or in an act passed in the fifth year of his present
 “ majesty’s reign, intituled, *an act for the further qualifica-
 “ tion of justices of the peace*, contained, shall extend to any
 “ peer, or lord of parliament, or to the lords or others of
 “ his majesty’s most honourable privy council, or to the
 “ justices of either bench, or to the barons of the court of
 “ exchequer, or to his majesty’s attorney or solicitor ge-
 “ neral, or to the justices of great sessions for the county
 “ palatine of *Chester*, and the several counties of the princi-
 “ pality of *Wales*, within their respective jurisdictions, or
 “ to the eldest son or heir apparent of any peer or lord of
 “ parliament, or of any person qualified to serve as a knight
 “ of a shire, by an act made in the ninth year of the
 “ reign of her late majesty queen *Anne*, intituled, *an act to
 “ secure the freedom of parliaments, by the further qualifying
 “ members to sit in the house of commons*; any thing herein
 “ contained to the contrary thereof in any wise notwith-
 “ standing.

Persons ex-
cepted.

Stat. 27. By 18. Geo. 2. c. 20. s. 14. “ Nothing in
 “ this act, or in the said act of the fifth year of the reign of
 “ his—

“ his present majesty contained, shall extend, or be construed to extend, to incapacitate or exclude the officers of the board of green cloth from being justices of the peace within the verge of his majesty's palaces, or to incapacitate or exclude the commissioners and principal officers of the navy, or the two under secretaries in each of the offices of principal secretary of state, or the secretary of *Chelsea* college, from being justices of the peace in or for such counties or places where they usually have been justices of the peace; any thing herein contained to the contrary in any wise notwithstanding.

Señ. 28. By 18. Geo. 2. c. 20. s. 15. “ This act, or any thing herein contained, shall not extend, or be construed to extend, to any of the heads of colleges or halls in either of the two universities of *Oxford* or *Cambridge*, or to the vice chancellor of either of the said universities, or to the mayor of the city of *Oxford*, or of the town of *Cambridge*, but that they may be and act as justices of the peace of and in the several counties of *Oxford*, *Berks*, and *Cambridge*, and the cities and towns within the same, and execute the office thereof as fully and freely in all respects as heretofore they have lawfully used to execute the same, as if this act had never been made; any thing herein before contained to the contrary notwithstanding.

IV. In what manner justices of the peace are to take the oaths of office.

Señ. 29. On renewing the commission of the peace, which generally happens when any person is newly brought into the office, a writ of *dedimus potestatem* issues out of the court of chancery, directed to some ancient justice, or other person, authorising them to take THE OATH of the person who is newly inserted in the commission, which is usually in 'a schedule annexed, and to certify the same unto the court of chancery on the day mentioned in the writ; unto which *oath of office* are usually annexed the oaths of *allegiance* and *supremacy*.

Señ. 30. The form of the oath of office is as follows:
 “ Ye shall swear, that as justice of the peace for the county of _____, in all articles in the king's commission to you directed, you shall do equal right to the poor and to the rich, after your cunning wit and power, and after the laws and customs of the realm and statutes thereof made: And ye shall not be of counsel of any quarrel hanging before you: And that ye hold your sessions after the form of the statutes thereof made: And the issues,
 “ hnes,

“ fines, and amerciaments that shall happen to be made,
 “ and all forfeitures which shall fall before you, ye shall
 “ cause to be entered without any concealment or embez-
 “ zling, and truly send them to the king’s exchequer. Ye
 “ shall not let for gift or other cause, but well and truly
 “ ye shall do your office of justice of the peace in that behalf:
 “ And that you take nothing for your office of justice of the
 “ peace to be done, but of the king, and fees accustomed,
 “ and costs limited by statute. And ye shall not direct, nor
 “ cause to be directed, any warrant (by you to be made)
 “ to the parties, but ye shall direct them to the bailiff of the
 “ said county, or other the king’s officers, or ministers, or
 “ other indifferent persons to do execution thereof. So
 “ help you God ”

† *Stat. 31.* By 1. Geo. 3. c. 13. “ All persons who
 “ are justices of the peace at the time of any demise of the
 “ crown, and shall afterwards be appointed justices of the
 “ peace by any commission granted by the succeeding sove-
 “ reign, who shall take the *oaths of office* of a justice of the
 “ peace before the clerk of the peace or his deputy for the
 “ respective county or place for which he shall act, or in-
 “ tend to act, and who shall have taken and subscribed at
 “ some general or quarter session of the peace, the oath di-
 “ rected by 18. Geo. 2. c. 20. shall and may act as a justice
 “ of the peace for such county or place, without being
 “ obliged to take and subscribe again the said oath, and
 “ without incurring any penalty or forfeiture for the not
 “ taking and subscribing thereof.”

The oaths to
 be only once
 taken.

† *Stat. 32.* And by 1. Geo. 3. c. 13. s. 2. “ And no
 “ person who hath taken the *oaths* usually taken by a jus-
 “ tice of the peace under a writ or commission of *dedimus*
 “ *potestatem*, shall be obliged to have any other *dedimus po-*
 “ *testatem* from the clerk of the crown, to authorise any
 “ person or persons, therein to be named, to administer
 “ again to any such justice, on any new commission of the
 “ peace, the oaths usually annexed to such *dedimus*, and
 “ taken by a justice of the peace:—But the clerk of the
 “ peace, or his deputy, shall on any new commission being
 “ issued, prepare a parchment roll, with the *oaths* usually
 “ taken under the *dedimus potestatem* annexed to and ingrossed
 “ on such roll, and shall administer, without fee, the oaths
 “ in such roll specified to every such justice of the peace
 “ within the respective counties or places for which he shall
 “ act or intend to act, who shall desire to take the same;
 “ and every justice, after taking the oaths contained in the
 “ said roll, shall subscribe his name on the same; and the
 “ roll with the oaths so taken and subscribed, shall be kept
 “ by”

“ by the respective clerks of the peace of the respective counties or places among the records of the sessions.”

Sec. 33. Some doubts having arisen upon the meaning of this act, it is declared by 7. Geo. 3. c. 9. “ That all persons appointed justices of the peace by any commission or commissions granted by his present majesty, who have taken and subscribed, or shall take and subscribe the oaths mentioned in the 1. Geo. 3. c. 13; and all persons who shall be appointed justices of the peace by any commission or commissions which shall be granted after his majesty’s demise, by any of his successors, kings and queens of this realm, and shall have, after the issuing of the first commission, whereby such person shall be appointed justice of peace, in the reign of any such king or queen, taken and subscribed the said oaths, shall not be obliged during the reign of his present majesty, or during any future reign, in which such oaths shall have been so taken and subscribed as aforesaid, to take and subscribe the same oaths for, or by reason of such person being again appointed justice of the peace by any subsequent commission or commissions which shall be granted during any such reign; and shall not incur any penalty or forfeiture for the not taking or subscribing the said oaths (2).”

(2) In general there is an indemnifying clause in some act of every session of parliament, provided the justices qualify according to the injunctions of the 10. Geo. 2. within the time which in such act is usually limited.

V. Who are incapable of acting as justices of the peace.

† *Sec. 34.* It is said, that if a justice of the peace be created a duke, archbishop, marquis, earl, viscount, baron, bishop, knight, judge, or serjeant at law, yet this will not take away his authority as justice of the peace; but if he be made coroner, this, by some opinion, is a discharge of his authority of justice. By 1. Mary, 2. c. 8. “ No person having or using the office of a sheriff of any county, shall use or exercise the office of a justice of peace, by force of any commission or otherwise, in any county where he shall be sheriff, during the time only that he shall exercise the said office, or sheriffwick: And all acts done by such sheriff by authority of any commission of the peace, during the time aforesaid, shall be void.” Dalton c. 3.
18. H. 6. 11.
Crom. 121.
Dait. c. 3.

† *Sec. 35.* By 5. Geo. 2. c. 18. “ No attorney, solicitor, or proctor in any court whatsoever, shall be capable to be a justice of the peace within any county of
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" *England or Wales*, during the time he shall practise in
" such character."

For the acts
relating to na-
val stores, vide
book first, c.
18. f. 18.

† *Stat.* 36. It is also enacted by 9. Geo. 3. c. 30. f. 5.
" That it shall and may be lawful to and for the treasurer,
" comptroller, surveyor, clerk of the acts, or any commis-
" sioner of the navy for the time being, from time to time,
" in all places whatsoever, to do, perform, exercise, and
" execute the office and duty of a justice or justices of the
" peace to all intents and purposes whatsoever, in causing
" any person or persons who shall be charged with coun-
" terfeiting, or procuring to be counterfeited any letter of
" attorney, bill, ticket, certificate, assignment, last-will,
" or other power or authority; or with uttering or pub-
" lishing the same as true, in order to receive any wages,
" pay, or other allowance due to any officer, seaman, or
" other person in the service of his majesty; or with tak-
" ing or procuring false oaths to be taken for any of the
" purposes aforesaid; or to obtain the probate of any writ
" or letter of administration in order to receive such wages,
" pay, or other allowance; or with stealing or embez-
" zling any naval stores (a) the property of the king, to be
" apprehended, committed, and prosecuted for the same."

(a) By 17.
Geo. 2. c. 47.
f. 10. the quar-
ter sessions has jurisdiction over this offence, and may inflict a penalty of 200l. and im-
prisonment, &c. upon the offender.

VI. What statutes concerning the peace may be executed
by such justices.

Lamb. b. 1. c.
9.
Dalt. c. 5.
Com. 7. 8.

Stat. 37. It seems certain, that by virtue of the said
commission they may execute all statutes whatsoever made
for the better keeping of the peace, and consequently those
of *Winchester* and *Westminster*, and all others concerning the
peace, made before the reign of *Edward the third*, in whose
time justices of peace were first instituted; for all those
statutes were expressly mentioned in the ancient commissions
of the peace, and have always been undoubtedly taken to be
included in the general words of the present commission;
and yet none of the statutes which ordain the office of jus-
tices of peace, say any thing concerning the execution of
the said former statutes, so that the power of justices of peace
in relation to those statutes, seems intirely to depend on the
king's commission, and yet hath always been unquestiona-
bly allowed. From whence it appears, that regularly the
king by his commission may authorise whom he pleases to
execute an act of parliament.

S. A.

† *Sec. 38.* Justices of peace cannot execute a statute in the case of a new-created offence, unless authority be given to them for such purpose in express words. Rex. v. James, 2. Stra. 1256. 1. Salk. 680.

† *Sec. 39.* They cannot therefore proceed upon the statute of usury (a), or upon the 1. & 2. Philip and Mary, c. 11, for using more looms than one (b), or 1. & 2. Phil. & Mary, c. 7. for selling wares in a corporation (c), or upon the 2. & 3. Edw. 6. c. 4 (d), nor upon the 5. Eliz. c. 14. for forging a false deed (e). (a) 1. Salk. 680. (b) 4. Mod. 379. (c) 5. Mod. 149. (d) 4. Mod. 51. (e) Cro. Eliz. 87. Sed vide Cro. Eliz. 601.

† *Sec. 40.* By 15. Car. 2. c. 11. s. 8. “No commissioner, farmer, or sub commissioner for the excise, or common brewer of ale or beer to sell, or innkeeper whatsoever, shall act in or execute as a justice of the peace, any of the powers, clauses, or things contained in any of the laws made for and concerning the excise.”

† *Sec. 41.* By 24. Geo. 2. c. 40. s. 22. “No person or persons whatsoever, being a common brewer of ale or beer, or innkeeper, distiller, or other seller of or dealer in any kind of spirituous liquors, or who is, or are, or shall be interested in any of the said trades or businesses, shall, during such time as he or they shall be such common brewer, &c. be capable, or have power to act, or shall be directly or indirectly concerned in acting as a justice of the peace in any matter or thing whatsoever, which shall any way concern the execution of the powers or authorities given or granted by any act or acts of parliament in any wise relating to distillers, or makers of low wines, spirits, strong waters, or any other kind of spirituous liquors whatsoever, or to the granting licences to the retailers of spirituous liquors.”

† *Sec. 42.* By 26. Geo. 2. c. 13. s. 12. “Neither the persons above-mentioned, or any justice of peace being a victualler or maltster, shall, during such time as he shall be, or be interested in the said businesses. have power to grant any licence to any person or persons whatsoever for the selling of ale, beer, or other liquors by retail.”

† *Sec. 43.* By 31. Geo. 2. c. 29. s. 32. “No person who shall follow or be concerned in the business of a miller, mealman, or baker shall be capable of acting, or shall be allowed to act as a magistrate or justice of the peace in any matter relating to the due making of bread, the regulation of the price and affize thereof, or in the punishment of persons who shall adulterate meal, flour,

" or bread contrary to the said statute, on penalty of fifty pounds."

VII. How justices of peace for a county may act out of it, or within a liberty.

C. Car. 211.
212.
2. Hale 51.
C. Car. 248.

Stat. 44. It is said, that they have no coercive power when out of the county; and therefore that an order of bastardy, or an order for payment of labourers wages, made by them out of the county, is not binding. Yet it is said, that recognizances and informations voluntarily taken before them in any place are good.

† *Stat. 45.* And for the greater ease of justices of the peace for any county of this realm, it is enacted by 9. Geo. 1. c. 7. §. 3. " That if any such justice of the peace shall happen to dwell in any city or other precinct that is a county of itself, situate within the county at large, for which he shall be appointed justice of peace, although not within the same county, it shall and may be lawful for any such justice of peace to grant warrants, take examinations, and make orders for any matters which any one or more justice or justices of the peace may act in at his own dwelling-house, although such dwelling-house be out of the county where he is authorized to act as a justice of peace, and in some city, or other precinct adjoining, that is a county of itself; and that all such warrants, orders, and other act or acts of any justice of the peace, and the act or acts of any constable, tithingman, headborough, overseer of the poor, surveyor of the highways, or other officer, in obedience to any such warrant or order, shall be as valid, good, and effectual in the law, although it happen to be out of the limits of the proper precinct or authority:—PROVIDED that nothing in this act shall empower justices for counties at large to hold their general quarter sessions in the cities or towns which are counties of themselves, nor to empower justices of peace, sheriffs, bailiffs, constables, headboroughs, tythingmen, borough-holders, or any other peace-officers of the counties at large, to act or intermeddle in any matters or things arising within cities or towns which are counties of themselves, but that all such actings and doings shall be of the same force as if this act had not been made."

† *Stat. 46.* And by 28. Geo. 3. c. 49. to remove all doubts respecting the construction of the above statute, it is enacted, " that it shall be lawful for any justice acting for any county at large to act as such at any place within any city, town, or

“or *precinct* being a *county of itself*, and situated within, surrounded by, or adjoining to any such county at large. But the same shall not extend to give power to the justices for any county at large, not being justices for such city, town, or precinct, or any constable or other officer acting under them, to act or intermeddle in any matter or thing arising within any such city, town, or precinct in any manner whatsoever.”

Sec. 47. And it is to be observed, that the justices of peace for a county have by their commission an express authority as well within liberties as without; from whence it seems clearly to follow, that they may execute their office within a town which has a special commission of the peace for its own limits, unless such commission have a clause, that no other justices, except those named in it, shall any way concern themselves in the keeping of the peace within the liberties of such town; and it may be questioned, whether such a special clause in such a commission do absolutely make void the act of any county-justice within such town, since the commission for the county seems as fully to give those named in it a jurisdiction over all such towns within the precinct of it, as such commission for a town doth exclude them; and the justices for the county seem to be under no necessity of informing themselves of the contents of a commission which they have nothing to do with: yet if they have express notice given them of such a restraining clause, and proceed to act within such town in defiance of it, they may perhaps be punishable for their contempt of the king's prohibition; and yet perhaps it may be questioned whether their acts be void, for the reasons above-mentioned.

Vide 2. & 3.
P. & M. c. 18.
2. Hale 47, 48.
Lamb. b. 1.
c. 9.
Con. Crom. 8.
20. H. 7. 6. 7. 8.

Keb. 559.

† *Sec. 48.* It has been resolved, that if (a) the crown grant to any city to have justices of its own within itself, excluding the county justices from intermeddling in the ordinary business of a justice of the peace, that in such case the act of the county justices will be void, and not be considered only as a breach of the franchise; and that where they are generally named, as in the 12. Car. 2. c. 23. which gives the jurisdiction in excise matters “to justices of the peace residing near the place where the forfeiture shall be made, or offence committed,” they have concurrent jurisdiction as their locality may chance to be.

(a) Talbot v. Hubble, Stra. 1154. See also Rex v. Morgan, Cald. 156.

† *Sec. 49.* So also it has been resolved, (b) that a charter granting jurisdiction to borough magistrates over a district not within the borough, does not exclude the county justices from having a concurrent jurisdiction without express

(b) Blankley v. Winstanley, 3. Term Rep. 279.

(a) *Rex v.*
Sainsbury.
 4 T. Rep. 451.

words in the charter. Therefore, although by charter the mayor and some of the aldermen of *London* have jurisdiction in *Southwark*, yet as the charter contains no *non intro-mittant* clause as to the justices of the county of *Surrey*, the latter have a concurrent jurisdiction with the former (a).

† *Sec. 50.* But doubts and questions having arisen touching the *commitment of offenders* by justices of the peace of liberties and corporations to the houses of correction of counties, ridings, or divisions, in which such liberties and corporations are situate, though the inhabitants of such liberties and corporations contribute to the maintenance and support of such houses of correction; it is enacted by 15. Geo. 2. c. 24. “That in all cases where any person liable
 “by law to be committed to the house of correction, shall
 “be apprehended within any liberty, city, or town corporate, whose inhabitants are contributing to the support
 “and maintenance of the house or houses of correction in
 “the county, riding, or division, in which such liberty,
 “city, or town corporate, is situate; it shall and may be
 “lawful for the justices of the peace of such liberty, city,
 “or town corporate, to commit such person to the house
 “of correction of the county, riding, or division, in which
 “such liberty, city, or town corporate, is situate, and such
 “persons so committed shall be dealt with, &c. to all in-
 “tents and purposes as if committed by the county, &c.”

Person is to be
 taken in the
 plural as well
 as the singular
 number.

† It also frequently happened that persons against whom warrants were granted by the justices of the peace for the several counties within this kingdom, escaped into other counties or places out of the jurisdiction of the justices of the peace granting such warrants, and thereby avoided being punished for the offences wherewith they were charged. It is therefore enacted by 24. Geo. 2. c. 55. “That in case
 “any person, against whom a warrant shall be issued by any
 “justice of the peace for any county or place within this
 “kingdom, shall escape, go into, reside, or be in any other
 “county or place out of the jurisdiction of the justice grant-
 “ing such warrant as aforesaid, it shall and may be lawful
 “for any justice of the peace of the county or place where
 “such person shall escape, go into, reside, or be, and such
 “justice is hereby required, upon proof being made upon
 “oath of the hand-writing of the justice granting such
 “warrant, to indorse his name on such warrant, which
 “shall be a sufficient authority to the person bringing such
 “warrant, and to all other persons to whom such warrant
 “was originally directed, to execute such warrant in such
 “other county or place out of the jurisdiction of the justice
 “granting such warrant as aforesaid, and to apprehend and
 “carry

JUSTICES OF THE PEACE.

“ carry such offender before the justice who indorsed such
 “ warrant, or some other justice of such other county or
 “ place where such warrant was indorsed, in case the of-
 “ fence, for which the offender shall be so apprehended in
 “ such other county or place as aforesaid, shall be bailable
 “ in law, and such offender shall be ready and willing to
 “ give bail for his appearance at the next assizes or general
 “ gaol-delivery, or next general quarter sessions of the peace
 “ to be held in and for the county or place where the of-
 “ fence was committed, in the same manner as the justices
 “ of the peace of the proper county or place should or might
 “ have done in such proper county or place ; and the justice
 “ of such other county or place so taking bail as aforesaid,
 “ shall deliver the recognizance, together with the exami-
 “ nation or confession of such offender, and all other pro-
 “ ceedings relating thereto, to the constable, tithingman,
 “ or other person or persons so apprehending such offender
 “ as aforesaid, who are hereby required to receive the same,
 “ and to deliver them over to the clerk of the assizes, or
 “ clerk of the peace of the county or place where such of-
 “ fender is required to appear by virtue of such recogni-
 “ zance ; and on default so to deliver over the same, the
 “ person neglecting shall forfeit 10*l*.—And in case the
 “ offence for which such offender shall be apprehended and
 “ taken in any other county or place shall not be bailable
 “ in law ; or such offender shall not give bail to appear as
 “ aforesaid to the satisfaction of the justice before whom
 “ such offender shall be brought in such other county or
 “ place ; then, and in that case, the person apprehending
 “ such offender shall carry and convey such offender before
 “ one of the justices of the peace for the proper county or
 “ place where such offence was committed, there to be dealt
 “ with according to law.—No prosecution shall be brought
 “ against the justice for or by reason of his indorsing such
 “ warrant. But the justice who originally granted the
 “ warrant, may be prosecuted in the same manner as he
 “ might have been if this act had not been made.”

+ *Stat.* 51. By 28. Geo. 3. c. 49. reciting that the admi-
 nistration of justice was frequently obstructed for want of
 resident justices of the peace, IT IS ENACTED, “ that any
 “ justice of the peace acting as such for any two or more
 “ counties, being adjoining counties, may act as a justice of
 “ the peace in all matters and things whatsoever concern-
 “ ing, or in any wise relating to any or either of the said
 “ counties ; and that all acts of such justice of the peace, and
 “ the acts of any constable, or other officer in obedience
 “ thereto, shall be as valid, good, and effectual in the law, to
 “ all intents and purposes whatsoever, as if such acts of the
 “ said

Justices may
 act for two
 adjoining
 counties,

OF THE COURT OF

if they reside
in either, at
the time of
acting.

“ said justices had been done in the county to which such
“ acts more particularly relate; and all constables and other
“ officers of the said county or counties to which such act
“ or acts relate, are hereby authorised and required to obey
“ the warrants, orders, directions, act and acts of such jus-
“ tice or justices so granted, given and done, and to do and
“ perform their several offices and duties, under the pains
“ and penalties to which any constable or other officer may
“ be liable for a neglect of duty: Provided always, that such
“ justice or justices be personally resident in one of the said
“ counties at the time of doing such act or acts: Provided
“ also, that the warrants, orders, or directions, so to be
“ given and granted, be directed and given in the first in-
“ stance to the constable or other officer of the county to
“ which the same more particularly relate.”

Constables,
&c. may carry
offenders be-
fore justices
acting for the
county, and
resident in the
adjacent
county, &c.

+ *Stat. 52.* By 28. Geo. 3. c. 49. s. 2. it is enacted, “ That,
“ from and after the passing of this act, it shall and may be
“ lawful for any constable, tythingman, headborough, or
“ other peace-officer, or any other person or persons appre-
“ hending or taking into custody any person or persons of-
“ fending against law, and whom they lawfully may and ought
“ to apprehend and take into custody by virtue of his or their
“ office or offices, or otherwise howsoever, to convey and
“ take the person or persons so apprehended or taken into
“ custody as aforesaid, to any justice or justices of the peace
“ acting for the said county, and resident in such adjoining
“ county as aforesaid; and the said constables, tythingmen,
“ headboroughs, and other peace-officers, and all and every
“ other person or persons, are hereby authorised, empow-
“ ered, and required, in all such cases, so to act in all
“ things as if the said justice or justices of the peace was or
“ were resident within the said county to which they respec-
“ tively belong; and all and every person or persons ob-
“ structing or hindering the said constables, tythingmen,
“ headboroughs, or other peace-officers, in the execution
“ of their respective offices, in the said county or counties
“ adjoining as aforesaid, shall be, and are hereby made li-
“ able to the same pains and penalties for such obstruction
“ and hindrance of the said officers in the execution of
“ their respective offices, as if the same had been committed
“ in the county for which the said constables, tythingmen,
“ headboroughs, or other peace-officers, were appointed to
“ act.”

VIII. What commissions of this kind require a special
suit to the king for granting of them.

Sec. 53. It seems agreed, that notwithstanding all such commissions must be in the king's name, as hath been more fully shewn chapter the fifth, section the first, yet there is not any need of a special suit or application to, or warrant from the king, for the granting of them; for this is only requisite for such as are of a particular nature, as constituting THE MAYOR of such a town, and his successors, perpetual justices of the peace within their liberties, &c. which commissions are neither revocable by the king, nor determinable by his death, as the common commission for the peace is, (a) which is made of course by THE LORD CHANCELLOR according to his discretion.

Lamb. b. 1.
c. 5.
B. Commis. 5.
Dalt. c. 3.
1. Lev. 219.
Roll. 135.
Ld. Raym.
1030.

3. Burn 8,
(a) But see 1.
Ann c. 8. f. 2.

IX. How far justices of peace have power to proceed on indictments not taken before themselves.

Sec. 54. It is certain, that subsequent justices of peace may proceed upon indictments taken before their predecessors; but this seems chiefly to depend upon 1. Hen. 6. c. 6. which, reciting the inconvenience that pleas and processes upon indictments before justices of the peace had often been discontinued by making of new commissions of the peace, to the great loss of the king, &c. ordains, "That such pleas, suits, and processes before justices of the peace, shall not be discontinued by new commissions of the peace, but stand in force; and that the new justices, after that they have the records of the same pleas and processes before them, may continue, and finally hear and determine the same, &c." And this is farther confirmed by 1. Edw. 6. c. 17. f. 6. But it is certain that they cannot proceed on an indictment taken before a coroner, or justices of oyer and terminer, or gaol delivery, nor deliver persons suspected by proclamation. But by 1. Edw. 4. c. 2. they are enabled to proceed on indictments taken before the sheriff at his tourn.

Crom. 2. 3.
2. Hale 46.
3. Burn 22.

Crom. 9.
Sum. 166.

X. By what name such justices are to be described.

Sec. 55. It is observable, that they are expressly commissioned by the name of "*justices of peace*;" and in no part of their commission are called by the name of "keepers of the peace;" yet inasmuch as by 18. Edw. 3. c. 2. which is one of the first statutes made concerning their institution, they are expressly called "keepers of the peace;" and the principal end of their office is for the keeping of the peace; and their usual description in *certioraris* is by the name of "keepers of the peace;" it hath been adjudged, that the caption of an indictment (whereof justices of peace have cognisance), *coram A. B. et C. D. custodibus pacis et justiciariis domini regis* in such a place, is good, without expressly naming

2. R. Abr. 95.

The King and
Hawkins,
Mich. 3. Geo.
1.

ing them justices of peace. Also it hath been resolved, that the description of justices of peace by the name of *justiciarii domini regis ad pacem conservandam*, &c. is good, without saying *ad pacem domini regis*, for that it is necessarily implied (6).

(6) Also by the words "our peace," when the king dies the surety of the peace is discharged, for the party is not bound to keep the peace of the succeeding sovereign. *Crompt. 124.*

Justices may
act though
not of the
quorum.

† *Stat. 56.* And it is recited by 26. Geo. 2. c. 17. "That whereas authority is given by many acts of parliament to two or more justices of the peace, whereof one or more are to be of the *quorum*, and that divers acts, orders, adjudications, warrants, confirmations of indentures, and other instruments done, made, and executed by two or more justices of the peace, without expressing that they are, or that one of them is, of the *quorum*, have been and may be for that reason only, impeached, set aside, and vacated;" it is therefore enacted, "That no act, order, adjudication, warrant, indenture of apprenticeship, or other instrument already made, done, or executed, or hereafter to be made, done, or executed by two or more justices of the peace, which doth not express that one or more of the justices is or are of the *quorum*, shall be impeached, set aside, or vacated for that defect only."

XI. What authority justices of peace have in relation to felonies.

Com. Dig. 45.

Stat. 57. It is observable, that such of the said justices as are of the *quorum* only are expressly authorized to inquire of, and hear and determine felonies and trespasses, and that the above-mentioned statute of 18. Edw. 3. after it hath ordained, "That some persons shall be assigned keepers of the peace by the king's commission," saith in another distinct clause, "That at what time need shall be, the same shall be assigned by the king's commissions to hear and determine felonies and trespasses, &c." From whence it is inferred, that justices of peace have no power to hear and determine (a) *felonies*, unless they be authorized so to do by the express words of their commission. And this opinion is farther confirmed by the authority of *THE YEAR BOOKS* of (b) 2. *Rich. 3. pl. 9. a. b.* and 12 *Hen. 7. pl. 25. a.* wherein it is adjudged, that a *certiorari* to remove certain indictments taken before justices of peace was not good, because it named them only "justices of peace," without adding that they were "also assigned to hear and determine felonies, &c." Yet it seems, that it may probably be argued for the contrary opinion, that the statute of 34. Edw. 3.

(a) *Crom. 120.*
S. P. C. 53. 58.
96.
Sum. 165. 207.
2. *Hale 43. 44.*
(b) *B. Inq. 1.*
32. 50.
Co. Lit. 391.

c. 7. is exprefs, “ that the perfons affigned for the keeping
 “ of the peace fhall have power (among other things) to
 “ hear and determine felonies and trefpaffes, &c.” And this
 feems to be the principal ground of the refolution in the
 cafe of *Burnes v. Conftantine* (a), wherein it is adjudged, that
 the fetting forth of an indictment in a declaration as taken
 before “ juftices of peace being alfo affigned to hear and
 “ determine felonies, &c.” was well juftified upon oyer of
 the record, wherein it was taken before “ juftices of peace,”
 without adding, that they were “ affigned to hear and de-
 “ termine felonies, &c.” And as to the authority of *Stau-*
ford and *Hale*, it may be answered, that their opinion is
 exprefsly grounded on the wording of the ftatute of 18.
 Edw. 3. and it does not appear that they confidered the
 purport of 34. Edw. 3. As to the authority of 2. *Rich. 3.*
pl. 9. it may be answered, that the *certiorari* therein men-
 tioned was for the removal of an indictment for counter-
 feiting coin, and that the power of juftices of peace to take
 fuch an indictment, depends wholly upon the ftatute of 3.
 Hen. 5. c. 7. whereby it is enacted, “ That the juftices of
 “ peace throughout the realm fhall have power by the
 “ king’s commiffions to inquire of the faid offence.” And
 as to what is faid in 12. Hen. 7. c. 25. it may be answered,
 that the *certiorari* therein mentioned was to remove certain
 indictments, but it doth not appear from the book what
 thofe indictments were; fo that it is poffible they might be
 of a fpecial nature, not within the general purview of 34.
 Edw. 3. c. 1. *Secd quære.*

Secd. 58. However it is certain, that fuch a claufe in the
 commiffion of juftices “ to hear and determine felonies,
 “ &c.” gives them no jurifdiction over an offence which
 by ftatute is fpecially appointed to be determined by juftices
 of oyer and terminer, becaufe “ fuch juftices” fhall be intended
 to mean fuch juftices of oyer and terminer only which pro-
 perly and ufually are fo called, and not thofe who are dif-
 tinctly known by another name. And from hence it fol-
 lows, that juftices of the peace have no power to take an
 indictment upon the ftatute of 5. Eliz. c. 14. concerning
forgery; nor on the 2. & 3. Edw. 6. c. 24. againft accessaries in
 one county to felonies in another; nor on any other ftatute
 which fpecially limits the jurifdiction of determining any
 other felony to other juftices of a particular denomination.
 Yet inafmuch as all felonies include in them a breach of the
 peace, and the 2. and 3. Philip and Mary, c. 10. which
 directs juftices of peace to take the examinations of all fuch
 perfons as fhall be committed by them for felony, feems to
 fuppofe them to have a general power of committing all
 perfons accused of any kind of felony, and the general prac-
 tice

(a) Co. Jac.
 32.
 Yelv. 46.
 2. Roll. 151.
 Dyer 69.

Summary 165.
 2. Hale 44.
 9. Co. 118.
 C. Eliz. 87.
 601. 697.
 2. R. Abr. 96.

Str. 1256.

Kely. 1.

Dalt. c. 20.
2. Hale 44.

tice has always been agreeable hereto, it is said, that justices of peace may take the examination of persons brought before them for any kind of felony, and commit them to prison; and also take the information of the prosecutors upon oath, and bind them over to prosecute, and commit those who shall refuse to be so bound, if it appear that they can give material evidence. Also, inasmuch as the said statute of 2. & 3. Philip and Mary, c. 10. and also 1. & 2. Philip and Mary, c. 13. direct justices of peace, in cases of "homicide and other felonies," to take the examination of the offenders, and the information of others, and to certify the same to the justices of gaol-delivery, it hath been generally thought advisable for justices of peace to proceed no farther in relation to any felonies though within their commission, except only *petit larcenies* (7).

Summary 169.
2. Hale 46.
Strange 848.

1 Hale 414.
says they may take an inquisition of self murder if the body cannot be found.

(7) Justices of the peace in *England* may commit an offender against the *Irish law* for felony in order to be transmitted to *Ireland* to be tried, the offence being committed there. Strange 848. Barnard, K. B. 225. Fitzgibb. 111. 14. Viner Abr. 569. pl. 7. But a justice cannot take a person from the custody of the king's bench, and send him to the county gaol, but he may, by his warrant, charge him criminally, where he is in custody. Strange 828. Two justices may take a recognizance for the appearance of one charged with felony on the high seas at the sessions of admiralty, and the recognizance may be estreated into the exchequer. Parker 241.

XII. What authority justices of peace have in relation to TREASON, *præmunire*, and misprision of treason.

4. Com.D. 44.

Comb. 405.

Lamb. 226.

(a) Dalt. c.
90. 212. 460.
Summary 168.
(b) 2. Hale 44.
1. Hale 580.

Stat. 59. It seems to be agreed, that notwithstanding none of these offences are within the letter of their commission, yet inasmuch as they are *against the peace* of the king, and of the realm, any justice of peace may, either upon his own knowledge, or the complaint of others, cause any person to be apprehended for any such offence. And it is the opinion both of *Dalton* (a) and *Sir Matthew Hale* (b), that such justice may take the examination of the person so apprehended, and the information of all those who can give material evidence against him, and put the same in writing; and also bind over such who are able to give any such evidence to the king's bench, or gaol-delivery; and certify his proceedings to the same court to which he shall bind over such informers. And this opinion seems to be agreeable to constant practice, especially since the statutes of 1. & 2. Philip and Mary, c. 13. and 2. & 3. Philip and Mary, c. 10. which, directing justices of peace to proceed in this manner against persons brought before them for felony, seem to give them a discretionary power of proceeding in like manner against persons accused of the abovementioned offences.

Sett. 60. Also by 3. Hen. 5. c. 7. "Justices of peace shall have power by the king's commissions to inquire of counterfeiting, clipping, washing, and other falsity of money of the land, and thereupon to make process by *capias* only, against those who before them shall be thereof indicted."

Sett. 61. And by 5. Eliz. c. 1. s. 3. "Justices of peace may inquire of the offence of maintaining the pope's power, and shall certify every presentment made before them of any such offence, into the king's bench, within forty days after it shall be made, &c."

Sett. 62. And by 23. Edw. 1. s. 8. "They may inquire of all offences against that act, or against the acts of the first, fifth, or thirteenth years of the said queen's reign, touching acknowledging of the king's supreme government in causes ecclesiastical, or other matters touching the service of God, or coming to church, or establishment of true religion in this realm, within one year and a day after every such offence committed." 1. Leon. 239.

XIII. What authority justices of peace have in relation to *inferior offences*.

Sett. 63. It would be endless to enumerate all the offences within their jurisdiction, concerning which there have been such great numbers of statutes; and therefore I shall content myself in this place with observing, that by the abovementioned statutes of 34. Edw. 3. c. 1. and also by the express words of their commission, they are impowered to hear and determine all *trespasses*, which is a word of a very general extent, and in a large sense not only comprehends all inferior offences, which are properly and directly against the peace, as assaults and batteries, and such like, but also all others which are so only by construction, as all breaches of the law in general are (a) said to be. Vide 3. Burn's Justice 17. and 4. Com. Dig. title Justice of the Peace, in which all these inferior offences are treated of at large and successively.

(a) 6. Mod. 128.

Sett. 64. Yet it hath been of late settled, that justices of peace have no jurisdiction over (b) *forgery* or *perjury* at the common law; the principal reason of which resolution, as I apprehend, was, that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence; and the word "*trespass*," in its most proper and natural sense, is taken for such kind of injuries; it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the

(b) Salk. 406. Crom. 120. Lamb. b. 1. c. 12. 2. Stra. 1088. Sayer 278. 6. Mod. 379.

(a) 1. Lev.
139.
1. Sid. 271.
2. Willf. 160.
1. Keb. 559.
772. 788. 931.
2. Keb. 138.
Con. C.
Jac. 421.
Tr. 13. Annæ.
(b) Latch.
173.
Poph. 108.

the peace; (a) as *libels*, and such like, which on this account have been adjudged indictable before justices of peace. And for this reason principally, as I apprehend, the court of king's bench in the case of one *Pitt*, since the abovementioned resolution concerning *perjury* and *forgery*, refused to quash an indictment found at a session of the peace for a *libel*, but ordered the defendant to demur to it, if he thought fit (b). And upon the like reason perhaps the former opinion, that one may be indicted before justices of peace for being a common *night-walker* and *haunter of bawdy-houses*, may not be thought to contradict the abovementioned resolution.

C. Jac. 32.
Yelv. 46.
Con. 2. Roll.
151.

Sec. 65. Justices of peace by virtue of the abovementioned statute of 34. Edw. 3. c. 1. seem to have a jurisdiction over *barrators*, and such like offenders, whether they be mentioned in their commission or not.

King and
Loggain,
3. Burn. 17.
Crompton 8.

Sec. 66. And it seems clear that justices of peace have jurisdiction of all inferior crimes within their commission, whether such crimes be mentioned in any statute concerning them or not, for that all such crimes are either directly, or at least by consequence and judgment of law, against the peace; and upon this ground principally, as I apprehend, it was lately resolved, that they may take an indictment of *extortion*.

Rex v. James,
2. Stra. 1246.
2. Salk. 680.

† Sec. 67. But in new-created offences, justices of the peace have no jurisdiction without express words.

XIV. In what cases justices of the peace may act although interested.

(c) 1. Salk.
396. 607.

† Sec. 68. The general rule of law certainly is, that justices of the peace ought not to execute their office in their own case (c); and even in cases where such proceeding seems indispensably necessary, as in being publickly assaulted or personally abused, or their authority otherwise contemned, while in the execution of their duty, yet if another justice be present, his assistance should be required to punish the offender (d).

(d) Stra. 240.

† Sec. 69. And by the common law, if an order of removal were made by two justices, and one of them was an inhabitant of the parish from which the pauper was removed, such order was illegal and bad, on the ground that the justice who was an inhabitant was interdicted, as being liable to the poor's rate (e). But now the statute 16. Geo. 2. c. 18. reciting that "doubts had arisen whether, according

(e) Rex v.
Great Chart,
Burr. S. C.
244.
1754. 1173.

to

to the laws and statutes now in force, justices, of the peace may lawfully act in any case relating to parishes or places to the rates and taxes of which such justices respectively are rated or chargeable;" ENACTS, " That it shall and may be lawful to and for all and every justice or justices of the peace for any county, riding, city, liberty, franchise, borough, or town corporate, within their respective jurisdictions, to make, do, and execute all and every act or acts, matter or matters, thing or things, appertaining to their office as justice or justices of the peace, so far as the same relates to the laws for the relief, settlement, and maintenance of poor persons; for passing and punishing vagrants; for repair of the highways; or to any other laws concerning parochial taxes, levies, or rates; notwithstanding any such justice or justices of the peace is or are rated to or chargeable with the taxes, levies, or rates within any such parish, township, or place affected by any such act or acts of such justice or justices as aforesaid."—But this act shall not authorise any justice for any county or riding at large to act in the determination of any appeal to the quarter sessions for any such county or riding from any order, matter or thing, relating to any such parish, township, or place, where such justice or justices is or are so charged, taxed, or chargeable as aforesaid.

† *Stat.* 70. And on this statute it has been determined, that on an appeal to the sessions against an order of removal, those justices who are rated to the relief of the poor in either of the contending parishes have no right to vote. Rex v. Yarpole, 4 Term Rep. 71.

XV. How far justices of the peace are impowered to administer oaths.

† *Stat.* 71. By 15. Geo. 3. c. 39. " In all cases where any penalty is directed to be levied, or distress to be made, by any act of parliament now in force, or hereafter to be made, it shall and may be lawful for any justice or justices acting under the authority of such acts respectively, and he and they is and are hereby authorised and empowered to administer an oath or oaths, affirmation or affirmations, to any person or persons, for the purpose of levying such penalties or making such distresses respectively."

XVI. How far justices of the peace may act though not of the *quorum*.

† *Stat.* 72. By 7. Geo. 3. c. 21. it is enacted " That all acts, orders, adjudications, warrants, indentures of apprenticeship,

"prenticeship, or other instruments which shall be made.
 "done, or executed, by virtue of any act or acts of parlia-
 "ment made or to be made by two or more justices of the
 "peace qualified to act within such cities, boroughs, towns
 "corporate, franchises and liberties, as have only one jus-
 "tice of the peace of the *quorum* qualified to act within the
 "same, though neither of the said justices are of the *quo-*
 "*rum*, shall be valid and effectual in law, as if one of the
 "said justices had been of the *quorum*."

XVII. How far justices of the peace are protected in the discharge of their duty.

† *Seet.* 73. JUSTICES OF THE PEACE are strongly pro-
 tected by the law in the just execution of their office; and
 therefore all slanderous words spoken of them in the dis-
 charge of their duty, as "you are a rascal, a villain, and a
 "liar," are actionable (*a*), but they must be spoken of them
 in the execution of their duty (*b*).

(*a*) *Aston v.*
Blagrove,
Stra. 617.

Ld. Ray. 1396. *Kent v. Pocock,* *Stra.* 1168. *Rex v. Revel,* *Spr.* 420. (*b*) *R. v.*
Pocock, *Stra.* 1157.

† *Seet.* 74. Justices of the peace are not punishable *civily*
 for acts done by them in their judicial capacities, but if
 they abuse the authority with which they are entrusted,
 they may be punished *criminally* at the suit of the king by
 way of information. But in cases where they proceed mini-
 sterially rather than judicially, if they act corruptly, they
 are liable to an action at the suit of the party, as well as to
 an information at the suit of the king. The court of
 king's-bench, however, will never grant an information
 against a justice of the peace for a mere error in judgment;
 (*c*) for even where a justice does an illegal act, yet although
 the judgment was wrong, if his heart was right (*d*), if he
 acted honestly and candidly, without oppression, malice, re-
 venge, or any bad view or ill intention whatsoever, the
 court will never punish him by the extraordinary course of
 information (*e*), but leave the party complaining to the or-
 dinary legal remedy by *action* or by *indictment*: but if they
 act improperly knowingly, an information shall be
 granted (*f*).

Cro. Eliz. 130.
1 Leon. 187.
Post. ch. 13. f.
 20.

(*c*) *Rex v.*
Cox, 1. *Burr.*
 785.

(*d*) *Rex v.*
Young, 1.

Burr. 556.

(*e*) *Rex v.*

Palmer and

Baine, 2.

Burr. 1162.

(*f*) *Rex v.*

Jackson, 1.

Ter. Rep. 653.

Barley v.

Newman,

Trin. 16. *Geo.*

3.

Cro. Car. 175.
 285. 467.

Vaughan 213.

Nov. 32.

1. *Roll* 274.

Moor 845.

1. *Mod.* 184.

1. *Burr.* 602.

2. *Burr.* 1162.

† *Seet.* 75. It is enacted by 7. Jac. 1. c. 5. made perpe-
 tual by 21. Jac. 1. c. 12. "That if any action up-
 "on the case, trespass, battery, or false imprisonment, shall
 "be brought against any JUSTICE OF THE PEACE, mayor,
 "or bailiff of city or town corporate, headborough, port-
 "reve, constable, tythingman, or collector, for or concern-
 "ing any matter, cause, or thing, by them or any of them
 "done

“done by virtue or reason of their or any of their office or offices, it shall be lawful for such officers or any of them, and all others which in their aid or assistance, or by their commandment, shall do any thing touching or concerning his or their office or offices, to plead the general issue, not guilty, and give the special matter in evidence to the jury which shall try the same; and if the verdict shall pass with the defendant in such action, or the plaintiff become nonsuit, or suffer a *discontinuance*, in every such case, the justices or justice, or such other judge before whom the said matter shall be tried, shall allow to the defendant his double costs.”

+ *Stat.* 76. And it is further enacted by 21. Jac. 1. c. 12. (which extends the above act to churchwardens and overseers of the poor) “That the said suit shall be laid within the county where the trespass or fact shall be done and committed, and not elsewhere; and that upon the trial, if the plaintiff shall not prove to the jury that it was so done and committed, the jury shall find the defendant *not guilty*, without having any regard or respect to any evidence given by the plaintiff touching the cause of action.”

4. Inst. 174.
1. Inst. 283.
Vo. glan 113.
115. 117.
Morgan's
Vade Mec. 49.
Stat. 446.

+ *Stat.* 77. By 24. Geo. 2. c. 44. “No writ shall be sued out against, nor any copy of any process, at the suit of a subject, be served on, any justice of the peace for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him or left at the usual place of his abode, by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath, or claimeth to have against such justice of the peace; on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode, who shall be intitled to have the fee of twenty shillings for the preparing and serving such notice, and no more.”

+ *Stat.* 78. By 24. Geo. 2. c. 44. s. 2. “It shall and may be lawful to and for such justice of the peace, at any time within one calendar month after such notice given as aforesaid, to tender amends to the party complaining, or to his or her agent or attorney; and, in case the same is not accepted, to plead such tender in bar to any action to be brought against him, grounded on such writ or process, together with the plea of not guilty, and any other

N. B. By 30.
Geo. 2. c. 24.
s. 23. this
clause is ex-
tended to
justices acting
under that act.

Douglas 307.

“ plea, with the leave of the court ; and if, upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant ; and in such case, or in case the plaintiff shall become nonsuit, or shall discontinue his or her action, or in case judgment shall be given for such defendant or defendants upon demurrer, such justice shall be entitled to the like costs as he would have been entitled unto, in case he had pleaded the general issue only ; and if upon issue so joined the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant or defendants on such other plea or pleas, then they shall give a verdict for the plaintiff and such damages as they shall think proper, which he or she shall recover, together with his or her costs of suit.

† But by 24. Geo. 2. c. 44. f. 3. “ No such plaintiff shall recover any verdict against such justice in any case where the action shall be grounded on any act of the defendant as justice of the peace, unless it is proved upon the trial of such action, that such notice was given as aforesaid ; but in default thereof such justice shall recover a verdict and costs as aforesaid.”

† *Seft.* 79. By 24. Geo. 2. c. 44. f. 4. “ In case such justice shall neglect to tender any amends, or shall have tendered insufficient amends, before the action brought, it shall and may be lawful for him, by leave of the court where such action shall depend, at any time before issue joined to pay into court such sum of money as he shall see fit ; whereupon such proceedings, orders, and judgments shall be had, made, and given in and by such court (9), as in other actions where the defendant is allowed to pay money into court.”

(9) It must appear that the action was for something done in the execution of his duty ; or the court will fix a time for him to plead. But if it appear upon the production of the notice of action, it is sufficient. 2. Black. 859.

† And by 24. Geo. 2. c. 44. f. 5. “ No evidence shall be permitted to be given by the plaintiff on the trial of any such action as aforesaid, of any cause of action, except such as is contained in the notice hereby directed to be given.”

Cro. Car. 394.
10. Co. 76.
Wood b. 1.
c. 7.

† *Seft.* 80. By 24. Geo. 2. c. 44. f. 6. “ No action shall be brought against any constable, headborough or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made or left at the usual place of his abode, by the party or parties intending
“ in,

"ing to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith, by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, headborough, or other officer, or against such person or persons acting in his aid for any such cause as aforesaid, without making the justice or justices who signed or sealed the said warrant defendant or defendants, that on producing or proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such justice or justices (10); and if such action be brought jointly against such justice or justices, and also against such constable, headborough, or other officer, or person or persons acting in his or their aid as aforesaid, then, on proof of such warrant, the jury shall find for such constable, headborough, or other officer, and for such person or persons so acting as aforesaid, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict shall be given against the justice or justices, that in such case the plaintiff or plaintiffs shall recover his, her, or their costs against him or them, to be taxed in such manner by the proper officer as to include such costs as such plaintiff or plaintiffs are liable to pay such defendant or defendants for whom such verdict shall be found as aforesaid."

(10) If a justice of peace make a warrant in a case which is plainly out of his jurisdiction, such warrant is no justification to a constable. 1. *Strange* 711. *Wood* b. 1. c. 7. 2. *Strange* 1002. But if the justice exceed his authority in granting a warrant, yet the officer must execute it, and is indemnified for so doing. *Cro. Car.* 394. 10. *Co.* 76.

† *Stat.* 81. But it is provided by 24. *Geo.* 2. c. 44. s. 7. 2. *Ventris* 45. "That where the plaintiff in any such action against any justice of the peace shall obtain a verdict, in case the judge before whom the cause shall be tried shall, in open court, certify on the back of the record, that the injury for which such action was brought, was wilfully and maliciously committed, the plaintiff shall be intitled to have and receive double costs of suit.—And no action shall be brought unless commenced within six calendar months after the act committed."

† *Stat.* 82. It has been determined (a) on this branch of the statute, that where there is a special verdict, and it appears from the facts found that the act for which the action was brought was done by the defendant, by virtue of
(a) *Rex v. Pickins*, 12. h. 23. *Geo.* Dougl. 307. 1801.

Grindley v.
Holloway,
Doug. 307.

reason of his office as a justice of the peace, the master, on a verdict for the plaintiff, must tax double costs, though there has been no certificate or allowance by the judge before whom the cause was tried; but when it does not appear upon the record in what capacity the defendant was acting, an allowance of the judge at *nisi prius* is necessary.

Enrick v.
Carrington,
11. St. Tr. 321.

Sec. 83. It hath also been determined, that secretaries of state and privy counsellors are not magistrates, and that the king's messengers are not officers within the protection of the foregoing statutes.

Hill v. Bate-
man, 1. Stra.
710.

Sec. 84. It is agreed, that when an action is brought against justices of the peace for any wrong done by the exercise of their authority, as by committing a person under a conviction on the game laws without first attempting to distrain for the penalty, it is incumbent on the defendants to shew the regularity of their convictions; and that the informations, &c. laid before them upon which their convictions are grounded, must be produced and proved in court.

Hutchins v.
Chambers,
1. Burr. 580.

Sec. 85. It is also agreed, that an action of *trespass* will not lie against justices of the peace for making a warrant to distrain for the poor's rate under the 43. Eliz. c. 2. if the rate has not been appealed from, and the warrant is not void so as to make the parties executing it trespassers *ab initio*. But if a justice issue a warrant totally illegal, as if a pauper return without a certificate to the parish from whence he was removed, and the justice make a warrant to commit him to the house of correction, "there to remain until discharged by due course of law," instead of pursuing the statutes under which his authority on this subject is derived (a), he is liable to an action of *false imprisonment*, although he did not, in granting such warrant, act intentionally wrong (b).

(a) 13. & 14.
Car. 2. c. 12.
f. 3.
17. Geo. 2.
c. 53.
(b) Baldwin
v. Blackmore,
1 Burr. 596

XVIII. How far justices of the peace may award costs.

Sec. 86. By 18. Geo. 3. c. 19. "Where any complaint shall be made before any justice of the peace, and any warrant or summons shall issue in consequence of such complaint, it shall be lawful to and for any justice or justices of the peace who shall have heard and determined the matter of the said complaint, to award such costs to be paid by either of the parties, and in manner and form as to him or them shall seem fit, to the party injured; and if they shall not pay down or give satisfactory security for the same, the said justice or justices shall, by
"warrant

“ warrant under hand and seal, levy the said sum or sums
 “ by distress and sale, and where goods and chattels of such
 “ person cannot be found, shall commit such person to the
 “ house of correction for the county or place where such
 “ person shall reside, there to be kept to hard labour not
 “ exceeding one month, nor less than ten days, or until
 “ such sum or sums of money, together with the expences
 “ of the commitment, be first paid.”

+ *Sec. 87.* But it is provided by the said statute, “ That
 “ upon the conviction of any person or persons upon any
 “ penal statute where the penalty shall amount to or ex-
 “ ceed five pounds, the said costs shall be deducted by the
 “ said justice or justices, according to his or their discre-
 “ tion, out of the said penalty or penalties, so that the said
 “ deduction shall not exceed one-fifth part of the penalty or
 “ penalties aforesaid; and the remainder shall be paid to,
 “ or divided among, the person or persons who would have
 “ been intitled to the whole in case this act had not been
 “ made.”

CHAPTER THE EIGHTH,

CONTINUED.

OF

THE COURT

OF

SESSIONS.

Dalton's, 185.
Impey's Office
of Sheriff, 364.

THE COURT of *justices of the peace* in SESSIONS is an assembly of two or more such justices, whereof one is of the *quorum*, at a certain day and place before appointed, in order to *enquire, hear, and determine*, in pursuance of their commission, of any causes or matters therein contained; and this court when legally convened is a court of record.

For the better understanding hereof I shall consider,

1. At what time such court is to be held.
2. By whom and in what manner it is to be summoned and appointed.
3. In what manner such court shall be adjourned.
4. What persons are bound to give their attendance at it.
5. Whether it hath any power over its own members.
6. The difference between *general, special, and quarter sessions*.
7. What persons may practise in it.
8. Of the extent and nature of its jurisdiction.
9. In what cases it may *amend* proceedings.
10. In what cases the justices may award costs.
11. In what cases the sessions may make orders respecting THE COUNTY.

I. At what time such court is to be held.

Sett. 1. By 12. Rich. 2. c. 10. "The justices shall keep their sessions in every quarter of the year at least; and by three days if need be, on pain of being punished according to the discretion of the king's council, at the suit of every man that will complain."

Sett. 2. By 2. Hen. 5. ft. 1. c. 4. it is enacted, "That the justices of the peace in every shire named of the *quorum*, &c. (a) shall make their sessions four times in (a) *Vide* ante. the year, viz. in the first week after Michaelmas—Epiphany—Easter,—and the translation of St. Thomas the Martyr, and oftener if need be; and that the same justices shall hold their sessions throughout England in the same weeks every year."

Sett. 3. But by 14. Hen. 6. c. 4. it is enacted, "That Cro. Clr. 30. the justices of the peace for the county of Middlesex shall keep, observe, and execute the court of the session of the peace two times in the year at least, and more often if need be."—And because of the great business in this county, it is usual to hold four general, and four general quarter sessions in the year."

Sett. 4. By 33. Hen. 8. c. 10. the Tuesday after Easter 2. Hale 49. Week is expounded to be in the week after *clausum pasche* for the sessions to be held; yet *clausum pasche*, or Low Sunday is the first day in that week.

Sett. 5. Sir Matthew Hale says, the strict regular exposition of the statute of Henry the fifth for the week after Michaelmas, &c. is, that if Michaelmas fall upon a Sunday, or Monday, THE QUARTER SESSIONS in strictness should be held in the ensuing week, and not the same week. Yet it is very plain, that THE QUARTER SESSIONS are variously held in several counties, some at one day, some at another; and it hath been ruled, that these are each of them good QUARTER SESSIONS within the several acts that relate to quarter sessions, for that these acts, especially that of the 2. Hen. 5. c. 4. is only directive and in the affirmative; and therefore though THE SESSIONS are held at another day, according to the general direction of the statute 12. Rich. 2. c. 10. yet they are quarter sessions. 2. Hale 49.

II. By whom and in what manner THE SESSION is to be summoned and appointed.

Sett. 6. It seems clear from the express words of THE COMMISSION, that any two justices of the peace whereof one is of the *quorum* may hold such court at such days and places C. C. C. 29. I. amb. b. 4. c. 2. & 20. Dalt ch. 185.

places as shall be appointed by them; and that the sheriff is bound to return proper juries; and that *the custos rotularum* ought to bring THE ROLLS of the peace before them, &c.

Lamb. b. 4.
c. 20. *SECT. 7.* And from hence it seems to follow, that any two such justices may direct their precept under their *teste* to the sheriff for the summons of the sessions of the peace, thereby commanding him to return A GRAND JURY before them, or their fellow-justices, at a certain day and place, and to give notice to all stewards, constables, and bailiffs of liberties, to be present and do their duties at such day and place, and to proclaim in proper places throughout his bailiwick, that such sessions will be holden at such day and place, and to attend there himself to his duty, &c.

Nelson 35.
4. Burn 218. *SECT. 8.* And such precept should bear *teste* or be dated fifteen days before the return; and ought forthwith to be delivered to the sheriff, to the end that he may have sufficient time to proclaim the sessions; to summon and return the several juries; and to warn all officers and others that have business there to attend.

2. Hale 41.
Lamb. b. 4. c. 2.
Crom. jur.
12. *SECT. 9.* And it is said, that such a precept by any two such justices cannot be *superfeded* by any of their fellows, but only by writ out of chancery.

Lamb. 382. *SECT. 10.* But it is not sufficient that the precept run under the name of the *custos rotularum* alone; for he hath no more authority in this behalf than any one of his fellow-justices; and the words of the commission are, "that the sheriffs shall cause a jury to appear at such days and places as the said justices, or two or more of them, shall appoint."

Walc 4. Burn.
181.
Lamb. 380. *SECT. 11.* It is said, that such justices may hold such a session without any such *summons*, which seems to be a well-grounded opinion, as to their proceeding on indictments before taken before themselves or others, or on other particular occasions, for which there is no need either for the attendance of the grand jurors, or officers, &c.

Lamb 380.
4. Burn 217. *SECT. 12.* It seems to be generally understood, that if a sufficient number of justices do not appear on the day appointed for holding the sessions, that the session for that quarter of the year is irrecoverably lost; but this must be understood, that there cannot be time to summon a session *de novo* in the very identical week next after any of the respective holidays mentioned in the statute 2. Hen. 15. c. 4; for a session may be opened without such summons and adjourned to another day, and the justices who open the session.

sion may issue their precept to the sheriff against the day of adjournment; and how many adjournments soever shall be holden afterwards in that quarter of the year, all shall refer to the first commencement of the sessions. For though a session shall not be holden within a week after such feast-day, it does not follow that therefore it cannot be holden in any of the twelve weeks afterwards, especially as it appears that any two justices one whereof is of the *quorum* may issue a precept to summon a session for the general execution of their authority, and that such session holden at any time within that quarter of the year is a general quarter session.

† *Sec. 13.* It was formerly thought, that if two or more justices appointed a session to be holden in one town, and so many more appointed a session in another town the same day, that both sessions were good, and that appearance at one would be a good discharge of service at the other (*a*). But this has been justly questioned (*b*); and it is now settled, that where two sets of magistrates have a concurrent jurisdiction, and one set appoints a session or a meeting for a special purpose, *their* jurisdiction attaches so as to exclude the other appointing a subsequent session or meeting; and not only renders their acts illegal, but subjects such justices to an indictment (*c*).

(*a*) *Dalt. c.*
185.
(*b*) 4. *Burn.*
219.
(*c*) *Rex v.*
Sainsbury,
Mich. Ter.
32. *Geo. 3.*
4. *Term Rep.*
451.

III. In what manner such court shall be adjourned.

† *Sec. 14.* The court of sessions, when regularly opened, can only be continued by adjournment (*d*), in the entry of which it ought to appear when the original sessions commenced (*e*); and therefore if an indictment be taken at an adjourned session, and it do not appear on what day the original session began, to bring it within the time prescribed by the statute 2. Hen. 5. c. 4. it is erroneous (*f*). So also in trespass and false imprisonment, where the defendant justified under a warrant made at a general quarter sessions that was held on the *ninth* day of *October*, by virtue of which said warrant he took the plaintiff on the *tenth* of *October* to bring him to the sessions; the court held the plea ill, because it was not shewn that the session was continued till the tenth of *October* (*g*), for all its proceedings, whether under the authority of particular statutes, or by the common law, must contain formal and regular continuances (*h*); and therefore where the caption of an indictment stated that the session was held on *Tuesday* the *fourth* of *October*, in the 25th year of the reign, and then stated that the same sessions were adjourned till *Tuesday* the *sixth* day of *July* aforesaid, it was held, on demurrer, to be bad, for the adjournment was to an impossible day. But the continuance of the session from

(*d*) *Rex v.*
Reading,
B. R. H. 80.
(*e*) 2. *Stra.*
832.
Rex v. Har-
rowby,
Burr. S. C. 102.
(*f*) *Fisher's*
c. 36, 2. Stra.
865. *Rex v.*
Grind, 2. Bott
P. L. 341.
(*g*) *Doughty*
v. Mills,
2. *Lev. 229.*
tamen quere.
(*h*) *Rex v.*
Polsted, Stra.
1263. *B. R. St.*
79.
(†) *Rex v.*
Fearnley,
1. *Term Rep.*
319.

day

- (a) Andr. 101. day to day need not be particularly set out (a), for while the session continues, it is considered in law as one day (b).
 (b) 2. Salk. 606. But if a session be once dropped and not adjourned, it cannot be resumed (c); and therefore if the sessions refer a matter to the determination of the judges of assize, who decline intermeddling, and the sessions afterwards make an order in the matter, it is void, for such reference is not a proper adjournment (d). So if the court are *equally divided* upon a question, it must be adjourned, or no order can be made at a subsequent session (e). An adjournment must be made by the same number of justices as are necessary to hold a session (f).
 (c) Stra. 1263. Burr. S. C. No. 135.
 (d) Rex v. Readley, B. R. H. 79.
 (e) Rex v. Hed- ingham-Sible, Burr. S. C. 112.
 (f) Rex v. Warliven, 2 Bott P. L. 844. (f) Rex v. Westminster, 2. Bott P. L. 844. pl. 824.

IV. What persons are bound to attend THE COURT OF SESSIONS.

4. Com. Dig. 153. D. 4. *Sett.* 15. There is no doubt but that *the sheriff* (who is bound both to return his precept, and also to take the charge of all the prisoners who shall be committed to him), and also all *constables of hundreds*, who are to make their presentments required by several statutes (as that of HUE AND CRY, and those relating to highways and ale-houses, &c.), and also all *bailiffs of franchises*, and all persons returned on a jury, and the (g) *keeper of the house of correction, &c.* are bound to attend on every such summons as is above mentioned, on pain of being amerced for their default at the discretion of the court, &c.
 For the mode of proceeding at sessions vide 4. Burn, 185 to 191. & Cro. Cir. Com. 28 to 79. Lamb. 422. Dalt. ch. 185. See the statute of Winchester, and b. 1. c. 78. f. 22. and c. 76. f. 45. (g) 7. Jac. 1. c. 4.

- † *Sett.* 16. Justices of the peace also ought without doubt to appear at the sessions; for without their appearance the sessions cannot be holden (h).
 (h) Dalc. c. 185.

V. Whether the court of sessions hath any power over its own members.

- Sett.* 17. It seems certain, that this court hath no authority to amerce any *justice of peace* for his non-attendance at any such court, as the *justices of assize* may for the absence of any such justice at THE GAOL-DELIVERY; for it is a general rule, that *inter pares non est potestas*, it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office, to other judges of a superior station, than to those of the same rank with themselves; and therefore it seems to have been holden, that if a *justice of peace* at THE SESSIONS who is not of the *quorum* shall use such expressions towards another who
- Lamb. 402.
 Crom. 122.
 F. Jus. de Peace, 2.

Ch. 8. OF THE COURT OF SESSIONS.

is of the *quorum*, for which, if he were a private person, he might be committed or bound to his good behaviour, yet THE SESSIONS have no authority to commit him, or to bind him to his good behaviour: And yet it seems to be agreed, that if a *justice of peace* give just cause to any person to demand the surety of the peace against him, he may be compelled by any other justice to find such security, as hath been shewn in the first book (a); for the public peace requires an immediate remedy in all such cases,

(a) Bk. 1.
c. 60. f. 5.

VI. The difference between *general*, *special*, and *quarter sessions*.

SECT. 18. Mr. Lambard seems to make no distinction between *general*, *special*, and *quarter sessions*, but to take them as synonymous terms. But it seems the better opinion, that the *quarter sessions* are a species only of *general sessions*, and that such sessions are properly called *general quarter sessions* which are holden in the four quarters of the year in pursuance of the above-mentioned statute of 2. Hen. 5. c. 4. (a) and that any other sessions holden at any other time for the general execution of the authority of justices of peace, which by the above-mentioned statute justices of the peace are authorised to hold oftener than at the times therein specified, if need be, may be properly called *general sessions*; and that those holden on a special occasion for the execution of some particular branch of their authority may properly be called *special sessions*.

Lamb. b. 4. a.
19, 20.

2. Hale 49, 50.

(a) Ante, p. 87

Salk. 474, 476.
480. 482.
5. Mod. 329.

Comb. 448.
C. rth. 227.
Lut. 911.

VII. What persons may practise in the court of sessions.

† SECT. 19. By 22. Geo. 2. c. 46. f. 12. it is enacted, "That no person whatsoever shall act as solicitor, attorney, or agent, or sue out any process at any general quarter sessions of the peace for any county or place within this kingdom, either with respect to matters of a criminal or civil nature, unless such person shall have been admitted and continued an attorney of one of his majesty's courts of record at Westminster, and duly enrolled pursuant to 2. Geo. 2. c. 23. or such other laws as may relate thereto, upon a penalty of fifty pounds, to be recovered by action of debt, bill, plaint, or information, in any of the courts of record at Westminster, by any person or persons who shall sue for the same within twelve months after the offence committed, with treble costs of suit."

† SECT. 20. By 22. Geo. 2. c. 46. f. 13. "If any attorney or attornies shall permit and suffer any person or persons whatsoever, not being admitted and enrolled as
"aforesaid,

“aforesaid, to make use of his or their name or names respectively, in the courts of general or quarter sessions aforesaid, he shall be liable to a like penalty of *fifty pounds*, to be recovered in manner aforesaid. But this shall not deprive the attornies of the *duchy of Lancaster*, or of the *great sessions of Wales*, or of the counties palatine of *Chester, Lancaster, and Durham*, from acting within their respective jurisdictions.”

Williams's
Case,
4. Term Rep.
496.

Seet. 21. The court of king's bench will refer an attorney's bill to be taxed, for business done at the quarter sessions.

(a) By 3. & 4.
Edw. 6. c. 1.
37. Hen. 8. c.
1. and 1. Will.
& Mary, c. 21.
f. 4.

† *Seet. 22.* And by 22. Geo. 2. c. 46. f. 14. to the end that justice may be more impartially administered, it is further enacted, “that no *clerk of the peace* (a) or his deputy, nor any under sheriff or his deputy, shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions of the peace to be held for such county or place where he shall execute the office of *clerk of the peace* (2), or deputy clerk of the peace, under sheriff or deputy, on any pretence whatsoever, upon the like penalty of fifty pounds, to be recovered in manner aforesaid.”

(2) The lord chancellor is to appoint a *custos rotulorum*, who shall appoint a clerk of the peace, able, and residing in the same county, to execute the office. Vide Shower 523. By this appointment he has the office *quamdiu se bene gesserit*, Shower 526. 4. Mod. 167. He is bound to attend the sessions, and upon his misbehaviour, he may, by the statute 1. Will. & Mary, c. 21. be suspended or discharged, 1. Shower 427. 500. 526. 536. Mod. Cases 192. 4. Mod. 32. according to the direction of the act, 2. Str. 996.

VIII. Of the extent and nature of the jurisdiction of the sessions.

(b) 4. Com.
Dig.

† *Seet. 23.* The court of sessions may proceed against offenders by presentment, by information, or by indictment (b).

(c) Ante.

† *Seet. 24.* The clause in the statutes of 18. Edw. 3. c. 2. and 34. Edw. 3. c. 1. (c) that the justices in sessions shall have power to “hear and determine *trespasses* at the king's suit, &c.” is construed to mean, that by COMMISSIONS they may have such a power; and therefore whenever they hold such pleas, they must shew an appointment to hear and determine (d).

Rex v. Jus-
tices of the
Peace for the
City of Lon-
don. 3. Burr.

† *Seet. 25.* If a statute give jurisdiction to the court of quarter sessions, and a proceeding be regularly commenced on such statute, and the justices adjourn the hearing and the final

final determination thereof, a repeal of the statute between the commencement of the cause and the day of adjournment, is an abolition of the jurisdiction of the sessions upon the subject, and they cannot proceed, though their authority had once attached.

† *Seet.* 26. Where authority is given to two justices of the peace to do any act, the sessions may do it in all cases, except where appeal is directed to the sessions.

Rex v. Broughton,
1. *Ld. Ray.*
426.

† *Seet.* 27. If a statute direct a proceeding at a *special sessions*, an *original order* made in the matter at a *general quarter sessions* is bad, even though the parties consent to the making thereof; for consent cannot give jurisdiction to a court that has none, and in such case the *general quarter sessions* has no original jurisdiction.

Rex v. Hartshorn and another, 2. *Burr.*
745.

† *Seet.* 28. If a statute, as 5. *Eliz. c. 4. f. 39.* for exercising a trade not having served an apprenticeship for seven years, enact, that the penalty may be recovered "in any of the king's courts of record, or before any of the justices of oyer and terminer, or before any other justices, or president and council, before remembered by action of debt, information, bill of complaint, or otherwise," the quarter session may proceed by *information* for such penalty. But if jurisdiction be given to the sessions to hear and determine without saying by *information*, this shall be by *indictment*, and not upon *information* (3).

Fareyn qui tam Williams,
Cowp. 369.

(3) *Dalt. c.*
191.
4. *Burn* 221.

† *Seet.* 29. The sessions have no power to judge of the validity of a deed, and therefore if a pauper is bound out an apprentice by the justices, and his master assigns him over to another, the sessions cannot adjudge the assignment void.

Rex v. Barnes,
1. *Stra.* 48.

† *Seet.* 30. The sessions have no jurisdiction over new-created offences not against the peace, unless the statute give them such jurisdiction in express terms; for by the general words of the commission from whence their authority is derived, they can only hear and determine offences *against the peace (a)*, and therefore they cannot take an indictment against the bailiff of a borough for having taken the oath of allegiance without having received the sacrament within the space of six months (*b*).

Rex v. James,
2. *Stra* 1256.
Rex v. Buggs,
4. *Mod.* 379.

(a) *Rex v. Alsop*, 4. *Mod.*
51.
(b) *Rex v. Briflow*,
Sayer 138.

† *Seet.* 31. The sessions are bound, like other courts of law, to make a direct and final judgment on the proceedings before them (*c*); and therefore they cannot refer a matter of which they have a jurisdiction to the determination of other persons,

(c) *B. R. H.*
81.

(a) *Rex v.*
Harding,
2. Salk. 477.

persons (a); but they may, by the consent of the parties, refer a thing to another to examine and make a report to them for their determination; for the court of king's bench will never suffer the party who consented to the reference to set it aside (b).

(b) *Cald.* 30.

† *Sect.* 32. The sessions may by the common law proceed to *outlawry* in cases of indictments found before them; and by the statute 21. Jac. 1. c. 4. in "all offences hereafter to be committed against any penal statute, for which any common informer may lawfully ground any popular action, bill, plaint, suit, or information, before justices of peace in their general or quarter sessions, the like process may be commenced, sued, or prosecuted, as in an action of trespass *vi et armis* at the common law." And it seems admitted by the statute 34. Hen. 8. c. 34. which requires the sessions to return a certificate of every *outlawry* into the king's bench, that they may issue a *capias utlagatum*, (c) or return the record of the *outlawry* into the king's bench, from whence process of *capias utlagatum* shall issue (d).

(c) 12. Co.
103.
(d) 2. Hale
52. Lamb. 521.
Quare.
But see post.
ch. 27. l. 115,
116.

Rex v. Bart-
lett, 2. Sess.
Cases 176.

† *Sect.* 33. The sessions cannot award an *attachment* for a contempt in not complying with their order; but the ordinary and proper method is by indictment.

IX. In what cases the sessions may make *amendments*.

† *Sect.* 34. It is enacted by 5. Geo. 2. c. 19. "That upon all appeals to be made to the justices of the peace at their respective general or quarter sessions in England, against judgments or orders given or made by any justices of the peace, such justices so assembled at any general or quarter sessions shall, and they are hereby required from time to time, within their respective jurisdiction, upon all and every such appeals so made to them, to cause any defect or defects of form that shall be found in any such original judgments or orders, to be rectified and amended without any cost or charge to the parties concerned, and after such amendment made shall proceed to hear, examine, and consider the truth and merits of all matters concerning such original judgments or orders, and likewise to examine all witnesses upon oath, and hear all other proofs relating thereto, and to make such determinations thereupon as by law they should or ought to have done in case there had not been such defect or want of form in the original proceeding."

For the conditions upon which the *certiorari* is allowed to remove these proceedings, vide title "Process."

X. In what cases the sessions may award costs.

† *Stat. 35.* By 8. and 9. Will. 3. c. 30. f. 3. it is enacted, "That THE QUARTER SESSIONS upon any appeal concerning the *settlement* of any poor person, or upon proof of notice of any such appeal, though not afterwards prosecuted, shall award and order such *costs* and *charges* as they think reasonable to be paid by those against whom such appeal shall be determined, or by the person who gave the notice as aforesaid; and if such person live without the jurisdiction of the court, every justice where such person shall inhabit, upon request, and a copy of the order produced and proved upon oath, by warrant under his hand and seal, shall cause the same to be levied by distress, and if no distress, commit the party for twenty days." Vide 43. Eliz. c. 2. 17. Geo. 2. c. 38. f. 6, 7.

† *Stat. 36.* And by 8. & 9. Will. 3. c. 30. f. 6. "The appeal against any order for the removal of any poor person from out of any parish, township, or place, shall be had, prosecuted, and determined at the *general* or *quarter sessions* for the county for the place from whence such removal shall lie, and not elsewhere." 4. Comm. 269.

† *Stat. 37.* By 9. Geo. 1. c. 7. f. 9. "If the justices of the peace shall, at their quarter sessions, upon an appeal before them there had concerning the settlement of any poor person, determine in favour of the appellant, that such poor person or persons was or were unduly removed, that then the said justices shall, at the same quarter sessions, order and award to such appellant so much money as shall appear to the said justices to have been reasonably paid by the parish, or other place, on whose behalf such appeal was made for or towards the relief of such poor person or persons, between the time of such undue removal and the determination of such appeal; the said money so awarded to be recovered in the same manner as costs and charges upon an appeal are prescribed to be covered by the said statute made in the ninth year of his late majesty king *William* the third." 8. & 9. W. 3. c. 30.

† *Stat. 38.* By 17. Geo. 2. c. 38. f. 4. "In case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, or shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her, or themselves aggrieved by any neglect, act, or thing done or omitted by the churchwardens and overseers" Persons aggrieved may appeal. See 3. Bur. 1366.

seers of the poor, or by any of his majesty's justices of the peace; it shall and may be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise, where such parish, township, or place lies; and the justices of the peace there assembled are hereby authorized and required to receive such appeal, and to hear and finally determine the same; but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter-sessions, and then and there finally hear and determine the same; and the said justices may award and order to the party, for whom such appeal shall be determined, reasonable costs, in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons, by an act made in the eighth and ninth years of king *William* the third.

Stat. 39. By 13. Geo. 3. c. 78. s. 80. " If any person shall think himself or herself aggrieved by any thing done by any justice or justices of the peace, or other person, in the execution of any of the powers given by this act, and for which no particular method of relief hath been already appointed, every such person may appeal to the justices of the peace, at any general quarter sessions of the peace to be held for the limit wherein the cause of such complaint shall arise, such appellant giving, or causing to be given, notice in writing of his or her intention to bring such appeal, and of the matter thereof, to the justice, or other person or persons against whom such complaint shall be made, within six days after the cause of such complaint arose, and within four days after such notice, entering into recognizance before some justice of the peace within such limit, with one sufficient surety, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the justices at such quarter session; and every justice of the peace, and other person, having received notice of such appeal as aforesaid, shall return all proceedings whatsoever had before them respectively, touching the matter of such appeal to the said justices, at their general quarter sessions aforesaid, on pain of forfeiting five pounds for every such neglect; and the said justices at such sessions, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against, as they

" the

“ the said justices shall think proper ; to be levied and re-
 “ covered as herein-before directed ; and the determination
 “ of such quarter session shall be final and conclusive to all
 “ intents and purposes ; and that no proceedings to be had
 “ ~~or taken~~ in pursuance of this act shall be quashed or vacated
 “ for want of form, or removed by *certiorari*, or any other
 “ writ or process whatsoever (except as herein-before-men-
 “ tioned), into any of his majesty’s courts of record at *West-*
 “ *minster*, any law or statute to the contrary notwithstanding :
 “ provided, that no such appeal shall be made against
 “ any conviction for any penalty or forfeiture incurred by
 “ virtue of this act, unless the person convicted shall, at the
 “ time of such conviction, if he or she shall be then pre-
 “ sent, if not, within six days after, give notice of his or
 “ her intention to appeal, and at the same time enter in-
 “ to recognizance with sufficient sureties to pay such penalty
 “ or forfeiture, in case such conviction shall be affirmed
 “ upon such appeal ; and upon his or her giving such secu-
 “ rity, the further proceeding for such penalty or forfeiture
 “ shall be suspended until such appeal shall be heard and de-
 “ termined.”

Proceedings
not quashed
for want of
form, nor re-
moveable, &c.

SECT. 40. By 13. Geo. 3. c. 84. (the general turnpike act) there are similar provisions with regard to appeals to THE SESSIONS, by persons aggrieved by any thing done in pursuance of that act.

SECT. 41. By 18. Geo. 3. c. 19. s. 5. “ In case the Appeal.
 “ overseer or overseers of the poor of any parish, town-
 “ ship, or place, for the time being, shall find that the said
 “ parish, township, or place, is aggrieved by any neglect,
 “ act, or thing done, or omitted, by the constable, head-
 “ borough or tithingman, or by any of his majesty’s jus-
 “ tices of the peace, or shall have any material objection to
 “ such account, or any part thereof, or to such determina-
 “ tion as aforesaid, it shall and may be lawful for such
 “ overseer or overseers, in any of the cases aforesaid, giving
 “ reasonable notice to the said justice, constable, head-bo-
 “ rough, or tythingman, to appeal to the next general or
 “ quarter sessions of the peace for the county, riding, divi-
 “ sion, city, town corporate, franchise, or liberty, where
 “ such parish, township, or place lies ; and the justices of
 “ the peace there assembled are hereby authorised and re-
 “ quired to receive such appeal, and to hear and finally de-
 “ termine the same ; but if it shall appear to the said jus-
 “ tices, that reasonable notice was not given, then they
 “ shall adjourn the said appeal to the next quarter sessions,
 “ and then and there finally hear and determine the same ;
 “ and the said justices may award and order, to the party
 VOL. III, H for

“ for whom such appeal shall be determined, reasonable
 “ costs, in the same manner that they are empowered to do
 “ in case of appeals concerning the settlement of poor per-
 “ sons, by an act made in the eighth and ninth years of
 “ king *William the third*.”

Sayer 108.
 143.

Seet. 42. An indictment will lie for not paying costs awarded by an order of sessions.

St. Mary
 Nottingham
v. Kirkling-
 ton. 2. Bott
 867.

Seet. 43. The court of king's bench will grant a *mandamus* to the sessions, commanding them to allow such costs and charges under 9. Geo. 1. c. 7. f. 9. as appear to them just and reasonable.

Maiden Brad-
 ley *v.* Wal-
 lingford,
 Foley, 247.

Seet. 44. The sessions in directing costs and charges need not state in the order the sums that were expended by the party to whom they are ordered to be paid.

Rex *v.* Stain-
 field.
 S. C. Burr.
 205.

Seet. 45. The sessions cannot order costs on the mere adjournment of an appeal.

XI. In what case the sessions may make orders respecting the county.

Where sud-
 den repairs
 are wanted,
 not exceeding
 30l. two jus-
 tices may
 make an or-
 der therein.—
 But where
 walls repaired
 by any parti-
 cular person
 or district,
 shall still be at
 their expence.

† *Seet.* 46. By 9. Geo. 3. c. 20. “ The justices of the
 “ peace, or the major part of them, in their respective ge-
 “ neral or quarter sessions assembled, upon presentment of
 “ THE GRAND JURY of the ill state and condition of THE
 “ SHIRE HALL, or other building, and the necessity of re-
 “ pairing the same, shall order and direct the same to be
 “ repaired in such manner as they in their discretions shall
 “ think fit, and shall assess and levy the necessary sums of
 “ money for this purpose upon the several divisions of the
 “ county, according to the directions of the 12. Geo. 2.
 “ c. 29. and 13. Geo. 2. c. 18.”

Power of the
 justices at ses-
 sions;

Seet. 47. By 14. Geo. 3. c. 59. “ The several justices
 “ of the peace in that part of *Great Britain* called *England*
 “ and *Wales*, within their several jurisdictions, in their
 “ quarter sessions assembled, are hereby authorized and re-
 “ quired to order the walls and ceilings of the several cells
 “ and wards, both of the debtors and the felons, and also of
 “ any other rooms used by the prisoners in their respective
 “ gaols and prisons where felons are usually confined, to
 “ be scraped and white-washed once in the year at least;
 “ to be regularly washed and kept clean, and constantly sup-
 “ plied with fresh air, by means of hand ventilators, or
 “ otherwise; to order two rooms in each gaol or prison,
 “ one for the men, and the other for the women, to be set
 “ apart

“ apart for the sick prisoners, directing them to be removed
 “ into such rooms as soon as they shall be seized with any
 “ disorder, and kept separate from those who shall be in
 “ health; to order a warm and cold bath, or commodious
 “ bathing tubs, to be provided in each gaol or prison, and to
 “ direct the prisoners to be washed in such warm or cold
 “ baths, or bathing tubs, according to the condition in which
 “ they shall be at the time, before they are suffered to go out
 “ of such gaols or prisons upon any occasion whatever; to
 “ order this act to be painted in large and legible characters
 “ upon a board, and hung up in some conspicuous part
 “ of each of the said gaols and prisons; and to appoint an
 “ experienced surgeon or apothecary, at a stated salary, to
 “ attend each gaol or prison respectively, who shall, and he
 “ is hereby directed to report to the said justices by whom
 “ he is appointed, at each quarter sessions, a state of the
 “ health of the prisoners under his care or superintendence.”

Stat. 48. By 14. Geo. 3. c. 59. s. 2. “ The said jus-
 “ tices of the peace, in their said quarter sessions assembled,
 “ are hereby authorized to direct the several courts of jus-
 “ tice within their respective jurisdictions to be properly
 “ ventilated; to order cloaths to be provided for the pri-
 “ soners when they see occasion; to prevent the prisoners
 “ from being kept under ground, whenever they can do it
 “ conveniently; and to make such other orders, from time to
 “ time, for restoring or preserving the health of prisoners, as
 “ they shall think necessary.”

who may if-
 sue orders as
 they shall
 think fit.

Stat. 49. By 14. Geo. 3. c. 59. s. 3. “ The expences
 “ attending the execution of the orders of the said justices,
 “ made in pursuance of this act, so far as the same shall re-
 “ spect county gaols and prisons, and courts of justice be-
 “ longing to counties, shall be borne and defrayed, at all
 “ times, out of the respective county rates; and so far as
 “ the same shall respect the gaols and prisons, and courts of
 “ justice, of particular cities, towns corporate, cinque ports,
 “ liberties, franchises, or places, that do not contri-
 “ bute to the rates of the counties in which they are re-
 “ spectively situated, such expences shall be defrayed out of
 “ the public stock or rates of such cities, towns corporate,
 “ cinque ports, liberties, franchises, or places, having such
 “ exclusive jurisdictions, to which such gaols, or prisons,
 “ or courts of justice, shall respectively belong: and if any
 “ gaoler or keeper of any prison shall, at any time, neglect
 “ or disobey the orders of such justices made in pursuance
 “ of this act, he may be proceeded against in a summary
 “ way, by complaint made to the judges of assize, or to the
 “ justices in their quarter sessions; and if he be found
 “ guilty of such neglect or disobedience, he shall pay such

Expences how
 to be defrayed.

Gaolers dis-
 obeying or-
 ders to be pro-
 ceeded against
 in a summary
 way.

“ fine as the judges of assize or justices shall impose, and
 “ shall be committed in case of non-payment.”

Rex v. the
 inhabitants of
 Essex, *haster*,
 32. Geo. 3.
 4. Term. Rep.
 591.

+ *Stat.* 50. If a fine be imposed on a county which the justices at sessions think illegal, they may order the treasurer to defray the expences of litigating the question, out of the county stock : so also they may order the treasurer to pay the expence of litigating any question respecting the repair of the highways, or county bridges, or the purchase of land adjoining to such bridges.

CHAPTER THE NINTH.

OF

THE COURT

OF

THE CORONER.

CORONERS are (*a*) ancient officers by the common law; (*a*) 2. Inst. 31. so (*b*) called, because they deal principally with the S.P.C. 48, 49. pleas of **THE CROWN**, and (*c*) were of old time the principal conservators of the peace within their county; and there He is of equal antiquity with the sheriff, still ought to be a certain number of them in every county; and was ordained with him to keep the peace in (*d*) some more, in others less, according as the usage hath been.

when the earls gave up the wardship of the county. Mirror c. i. f. 3. 1. Comm. 347. (*b*) 4. Inst. 73. 271. 2. Inst. 31. (*c*) C. 8. f. 3: (*d*) F. N. B. 397. 4. Inst. 73. 271. 2. Inst. 175: 2. Hale 5. 53. 1. Comm. 346. 4. Comm. 406. 2. Hale 53.

CORONERS are of three kinds. 1. By virtue of an office. 2. By charter or commission. 3. By election. 1. The lord chief justice of the king's bench is, by virtue of his office, principal coroner in the kingdom, and may, if he please, exercise the jurisdiction of coroner in any part of the realm. 2. The lord mayor of London is by charter of 18. Edw. 4. coroner of London. The bishop of Ely also hath power to make coroners, by the charter of *Henry the Seventh*; and there are coroners of particular lords of franchises, and liberties, who, by charter, have power to create their own coroners, or to be coroners themselves; especially the jurisdiction of **THE ADMIRALTY** and **THE VERGE**. 3. The general coroners of counties elected by virtue of statute Westminster the first, c. 18. and 28. Edw. 3. c. 6. 1. Hale 52. 4. Rep. 57. 1. Comm. 348.

Before I come to the particular consideration of their duty and authority, it may not be improper to premise the following particulars:—**FIRST**, What persons are qualified to be coroners.—**SECONDLY**, In what manner they are to be placed in their office.—**THIRDLY**, How they may be discharged.

As to **THE FIRST POINT**, viz. What persons are qualified to be coroners.

Stat. 2. It is enacted by the statute of *Westminster the first*, c. 10. in the following words, "Forasmuch as mean persons and indiscreet now of late are commonly chosen to the office of coroners, where it is requisite that persons honest, loyal and wise, shall occupy such offices: It is provided, that through all shires sufficient men shall

“ be chosen to be coroners of the most loyal and most wise
 “ knights, which know, will and may best attend upon
 “ such offices, and which lawfully shall attach and present
 “ pleas of the crown.”

Sec. 3. It is observable, that this statute seems expressly to require, that none under the degree of knighthood shall be chosen A CORONER, and that the *statute of Merton*, chapter the third, which was made near forty years before, seems to suppose that all coroners were knights. And it is farther remarkable, that in the writ *de coronatore exonerando* it is mentioned as a sufficient cause for the discharge of a coroner, that he is not a knight. Yet inasmuch as the principal intent of putting those words into the statute, was to prevent the choosing of persons of mean ability, which is sufficiently answered by choosing men of good substance and credit; and as it has been generally found impracticable to find knights enough in any county willing to undertake this office; and the constant usage of many late ages, which is the best interpreter of laws, hath suffered persons of good ability, under the degree of knights, to be chosen and continue coroners, without any objection against them on this account; it seems certain, that at this day it is no good cause to remove a coroner, that he is not a knight. For why should not such usage be as well allowed to make such an explanation of the law concerning coroners, as it unquestionably hath done of that relating to the representatives of a county in parliament, who by the writ for their election are expressly required to be *duo milites gladio cincti*, and yet may certainly be well chosen in pursuance of that writ, though they be under the degree of knights?

23. Aff. 7.
 4. Inst. 271.
 Reg. 177.
 F.N.B. 164.

S. P. C. 48. c.
 2. Leon. 160,
 161.
 F. N. B. 164.
 2. Inst. 176.
 2. Hale 55.

Co. Lit. 109.

2. Inst. 175.

Sec. 4. It is farther enacted by 14. Edw. 3. c. 8. “ that
 “ no coroner be chosen, unless he have land in fee sufficient in the same county, whereof he may answer to all
 “ manner of people.”

As to THE SECOND POINT, viz. In what manner coroners are to be placed in their office.

2. Hale 55.
 4. Inst. 271.

Sec. 5. It is observable, that they do not receive their authority from the king's commission, but from the election of the county in pursuance of the king's writ, issuing out of and afterwards returned into the chancery. And this is the reason why their authority does not determine by the demise of the king (a), as that of all judges, acting by the king's commission only, regularly does, as hath been more fully shewn chapter the first, section the eleventh.

(a) 2. Inst.
 175.
 3. Lev. 120.

Sec. 6. The abovementioned writ for the election of a coroner is in this form: FIRST, it recites the death or discharge of one or more former coroners, and then commands the sheriff to cause one other or more, as the case is, to be chosen, in a full county court, by the assent of the county, according to the form of the statute in that case made and provided; who having taken his oath in the usual manner, may do all things which belong to the office of a coroner, &c. and then it concludes with commanding the sheriff to certify to the court the name of the person chosen, &c.

1. Comm. 347.
See the form of such certificate in Rastal's Entries 133.

Sec. 7. (a) A coroner, being chosen by virtue of such writ, shall be sworn by the sheriff, that he will lawfully do what belongs to the office of a coroner, &c.

(a) S. P. 49.
2. Hale 55.
F. N. B. 163.
4. Inst. 271.

Sec. 8. (b) And inasmuch as he is chosen by the county, if he be insufficient, and not able to answer such fines, and other duties in respect of his office, as he ought, the county, as his superior, shall answer for him.

(b) 2. Inst. 174, 175.
2. Hale 56.

Sec. 9. And it is enacted by 28. Edw. 3. c. 6. "That all coroners of the counties shall be chosen in the full counties by the commons of the same counties, of the most meet and lawful people that shall be found in the same counties, to execute the said office: save always to the king and other lords, who ought to make such coroners, their feignories and franchises."

From this statute the two following points are observable,

Sec. 10. First, That all such elections are appointed by it to be made by the commons of the counties, without mentioning freeholders; and yet inasmuch as the said statute was made in affirmance of the common law, and none but freeholders are suitors to the county court, and that usage hath always been, both before and since the said statute, for such only to vote, it is certain, that none but freeholders have a voice at any such election.

F. N. B. 164.
S. P. C. 49.
(c) 2. Inst. 99.
2. R. Ab. 121.

Sec. 11. Secondly, That it is clearly supposed by the said statute, that not only the king, but also other lords, have the franchise of making coroners. From whence it seems reasonable to infer, that the king may lawfully claim such franchise by prescription, and that other lords may claim it by grant from the crown (d); but it is a privilege of so high a nature, that no subject can well intitle himself to it by prescription only.

2. Hale 53, 54.
Co. Lit. 114.
(d) Vide note to section 1.

As to THE THIRD POINT, *viz.* In what manner coroners may be discharged from their office.

Reg. 177.
F. N. B. 163,
164.
S. P. C. 48.
8. Co. 41.

Scit. 12. It is certain, that if any of them be so far engaged in any other publick business in the county, that he cannot have leisure enough to attend the office of a coroner; or if he be chosen verderor of a forest, or if he have not sufficient lands in the same county, whereon to live according to his state and degree, or if he be disabled either by old age, or any inveterate disease, as the palsy, or the like, to execute his office as he ought; and as some say, if he follow any common trade, he may be discharged by the writ *de coronatore exonerando* (1); which being directed to the sheriff, after a recital of the particular cause of the discharge of such coroner, commands him to cause another to be chosen in his room.

2. Inst. 32.
1. Comm. 348.

(1) But as it is an office of freehold, the court of chancery, with whom the power of granting this writ resides, will not suffer it to issue unless on affidavit that the defendant has been served with notice of the petition for it. 3. Atk. 184. And on an election of a new coroner, by a majority of freeholders (for the court cannot appoint a new one), the power and authority of the old coroner is *ipso facto* extinguished. Godb. 105.

Reg. 177, 178.
F. N. B. 164.
S. P. C. 49.

Scit. 13. But if any writ of this kind be grounded on an untrue suggestion, the coroner may procure a commission from the chancery to inquire of the truth of it, and to return the inquiry before the king into the chancery; and if upon such commission the suggestion be disproved, the king may make a *superfedas* to the sheriff, that he do not remove such coroner; or if he have removed him, that he suffer him to execute the office as he did before.

AND NOW I am particularly to consider the duty and authority of A CORONER.

For the better understanding whereof I shall examine the following points:—

First, In what places he hath a jurisdiction.

Secondly, How far he is impowered, and in what manner he ought to take an inquisition.

Thirdly, How far to receive and proceed on a bill of appeal.

Fourthly, How far to receive and proceed on the appeal of an approver.

Fifthly

Fifthly, How far to take the abjuration of a felon.

Sixthly, How far the act of any one of them shall be as effectual as if it had been done by all.

Seventhly, In what cases he may lawfully take a fee for the execution of his office.

Eighthly, In what cases a matter recorded by or found before him, admits of no traverse.

As to THE FIRST POINT, *viz.* In what places a coroner hath jurisdiction, I shall consider, How far he hath a jurisdiction of offences committed on the sea; and How far a coroner of the county may intermeddle with offences done within the verge of the court, and *vice versa*.

As to the first particular, *viz.* How far a coroner hath a jurisdiction of offences on the seas.

Sec. 14. It is laid down as a general rule by (a) some, that he may inquire of a felony committed on the arms of the sea, where a man may see from the one side to the other; but by others, who seem to be more accurate, his (b) power is confined to such parts of the sea where a man standing on the one side may see what is done on the other. But it seems to be (c) agreed, that he hath no jurisdiction of offences committed in the open sea, between the high and low water-mark when the tide is *in*; but that he hath an authority over offences committed in such places when the tide is *out* (2).

(a) Owen 122.
Moor 892.
2. Hale 54.
S. P. C. 51.
Summary 151.
(b) F. Cor. 399.
4. Inst. 140.
2. R. Ab. 169.
7.
(c) 3. Inst. 112.
5. Co. 107.

(2) The coroner of Portsmouth has jurisdiction on board a man of war lying in Portsmouth harbour; and the court granted an information against the captain for refusing to let him come on board; for though the admiralty have a coroner of their own, he never takes inquisitions *felo de se*. Strange 1097. Andr. 231.

As to the second particular, &c. *viz.* How far a coroner of the county may intermeddle with offences done within the verge of the court, and *vice versa*.

Sec. 15. It is said, that at the common law, as the coroner of the king's house had nothing to do with an offence committed in the county out of the verge; so neither had the coroner of the county any thing to do with an offence committed within the verge (d). And therefore it seems, that before the statute of *articuli super chartas*, if a person had been killed any where within the verge of the court, and the king had removed his court before the coroner of the king's house had

2. Leon. 160.
4. Co. 46.
2. Hale 54, 55.

(d) The coroner of the verge was anciently appointed by

the king's letters patent.
taken

taken an indictment, no coroner at all had any jurisdiction of the fact; not the coroner of the county, because he had nothing to do with what happened within the verge of the court; not the coroner of the king's house, because his authority ceased when the place where the matter happened, ceased to be within the verge of the court. And this seems to be confirmed by the statute of *articuli super chartas*, c. 3. whereby it is recited, that before the making of that act, "many felonies committed within the verge had been unpunished, because the coroners of the county had not been authorised to inquire of felonies done within the verge, but the coroner of the king's house, which never continued in one place, by reason whereof there can be no trial made in due manner, nor the felons put in exigent, nor outlawed, nor any thing presented in the circuit, the which had been to the great damage of the king, and nothing to the preservation of the peace." And thereupon it is ordained, "That from thenceforth in cases of the death of men whereof the coronet's office is to make view and inquest, it shall be commanded to the coroner of the county, that he, with the coroner of the king's house, shall do as belongeth to his office, and enroll it, &c." It is said indeed by *Sir Edward Coke*, that if a murder had been committed within the verge, and the king had removed before any indictment taken by the coroner of the verge, the coroner of the county might have inquired of the same at the common law, *ne maleficia remanerent impunita*. But since no authority is cited by him for the maintenance of this opinion, and the argument brought to prove it is founded on a mistaken supposition, inasmuch as it doth by no means follow, that such offences would be dispensable if they could not be inquired of by the coroner of the county, since they might certainly be indicted before justices of over and terminer, or of the peace, who have a general jurisdiction throughout the whole county; the contrary opinion seems rather the more plausible, as being more agreeable to the purport of the said statute, and the general tenor of our law books.

2. Inst. 550.

2. Inst. 549.

4. Co. 46, 47.

4. Co. 47.

2. Inst. 550.

Sec. 16. But it is certain, that an indictment taken before the coroner of the county, and the coroner of the king's house, of an offence not appearing by the indictment itself to have happened within the verge of the court, is insufficient, for that every material part of an indictment ought to be found by the oaths of the indictors, and cannot be supplied with any averment; and it doth not appear by the indictment, that the coroner of the king's house had any authority to take it; and it shall not be said to be void, and *peram non iudice*, as to the coroner of the king's house, and

and good as to the coroner of the county, inasmuch as the record is entire, and the indictment was taken entirely before both; and peradventure the jury was directed principally by the coroner of the house, and the witnesses examined and sworn by him.

Scet. 17. It hath been resolved, that if the same person be coroner of the county, and also of the king's house, an indictment of death taken before him as coroner both of the king's house and of the county, is good, because the mischief expressed in the statute is remedied as well when both offices are in the same person as when they are in divers.

2. Hale 55.
4. Co. 46.
3. Inst. 134.
2. Leon. 160.
the same Case,
but no resolution.

Scet. 18. Also it is enacted by 33. Hen. 8. c. 12. f. 1. 3.
“ That all inquisitions upon the view of persons slain with-
“ in any of the king's palaces or houses, or any other house
“ or houses, at such time as his majesty shall happen to be
“ there demurrant or abiding in his royal person, shall be
“ taken by the coroner for the time being of the king's
“ household, without any adjoining or assisting of another
“ coroner of any shire within this realm, by the oath of
“ twelve or more of the yeomen, officers of the king's
“ household returned by the two clerks controllers, the
“ clerks of the check, and the clerks marshals, or one of
“ them, for the time being, of the said household, to whom
“ the said coroner of the same household shall direct his
“ precept, which coroner shall be from time to time ap-
“ pointed by the lord great master or lord steward for the
“ time being; and that the said coroner shall certify under
“ his seal, and the seals of such persons as shall be sworn
“ before him, all such inquisitions before the said lord
“ master or lord steward, &c.”

2. Hale 54.

As to THE SECOND GENERAL POINT, *viz.* How far a coroner is impowered, and in what manner he ought to take an inquisition, I shall consider his authority of this kind—First, in relation to death.—Secondly, in relation to other matters.

As to his authority to take an inquisition of death, I shall examine—First, In what cases and in what manner he ought to take such inquisition.—Secondly, What farther care must be taken by him for the prosecution of the offender, after taking the inquisition.—Thirdly, What high credit the law gives to it.

As to the first of these particulars, *viz.* In what cases and in what manner a coroner ought to take an inquisition of death.

Bract. 121.

Fleta, b. 1. c.

25.

2. Halc, 59.

Wood, b. 4.

c. 1.

(a) If in an inquisition *per visum coronis*, the year of our Lord,

in the caption, is in common figures, it shall be quashed. It should be in words at length, or at least in Roman numerals. Strange 261.

Sec. 19. It is enacted by 4. Edw. 1. commonly called the statute *de officio coronatoris*, " That the coroner upon information shall go to the places where any be slain, or suddenly dead or wounded, and shall forthwith command four of the next towns, or five or six, to appear before him in such a place; and when they are come thither, the coroner upon the oath of them shall inquire (a) in this manner; that is, to wit, if they know where the person was slain, whether it were in any house, field, bed, tavern, or company, and who were there."

By 4. Edw. 1. " Likewise it is to be inquired who were culpable, either of the act or of the force, and who were present, either men or women, and of what age soever they be (if they can speak or have any discretion): And how many soever be found culpable by inquisition in any of the manners aforesaid, they shall be taken and delivered to the sheriff, and shall be committed to the gaol: And such as be founden, and be not culpable, shall be attached until the coming of the justices, and their names shall be written in the coroners rolls."

By 4. Edw. 1. " If it fortune any such man be slain which is found in the fields, or in the woods, first it is to be inquired whether he were slain in the same place or not; and if he were brought and laid there, they shall do as much as they can, to follow their steps that brought the body thither, whether he were brought upon a horse, or in a cart."

By 4. Edw. 1. " It shall be enquired also, if the dead person were known, or else a stranger, and where he lay the night before; and if any be found culpable of the murder, the coroner shall immediately go unto his house, and shall inquire what goods he hath, and what corn he hath in his grange; and if he be a freeman, they shall enquire how much land he hath, and what it is worth yearly; and further, what corn he hath upon the ground."

By 4. Edw. 1. " And when they have thus inquired upon every thing, they shall cause all the land, corn and goods, to be valued, in like manner as if they should be sold incontinently, and thereupon they shall be delivered

“ delivered to the whole township, which shall be answerable before the justices for all. And likewise of his freehold, how much it is worth yearly over and above the service due to the lords of the fee, and the land shall remain in the king's hands until the lords of the fee have made fine for it. And immediately upon these things being inquired, the bodies of such persons being dead or slain shall be buried.”

By 4. Edw. 1. “ In like manner it is to be inquired of them that be drowned, or suddenly dead, and after such bodies are to be seen, whether they were so drowned or slain, or strangled by the sign of a cord tied strait about their necks, or about any of their members, or upon any other hurt found about their bodies, whereupon they shall proceed in the form abovesaid; and if they were not slain, then ought the coroner to attach the finders, and all other in company.”

Sec. 20. By 4th Edw. 1. “ Also all wounds ought to be viewed, the length, breadth, and deepness, and with what weapons, and in what part of the body the wound or hurt is; and how many be culpable; and how many wounds there be, and who gave the wounds; all which things must be inrolled in the roll of the coroners.”

By 4. Edw. 1. “ Also horses, boats, carts, &c. whereby any are slain, that properly are called deodands, shall be valued and delivered unto the towns as before is said.”

Sec. 21. It is observable, that this statute being wholly directory and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty, not mentioned in it, which was incident to his office before; and from hence it follows, that though the statute mention only his taking inquiries of the death of persons slain or drowned, or suddenly dead, yet he may and ought to inquire of the death of all persons whatsoever who die in prison (3), to the end that the public may be satisfied, whether such persons came to their end by the common course of nature, or by some unlawful violence, or unreasonable hardships put on them by those under whose power they were confined.

F Cor. 421.
1. Inst 52.91
R Cor. 168.
S. P. C. 51.
1. Hale 432.
2. Hale 57.

(3) And this inquest upon prisoners ought to consist of a party jury, viz. six of the prisoners, and six of the next vill or parish. *Umfreville* 212.

Sett. 22. And the like reason also seems to be the best ground of the resolution which we find in some (a) books, that there is no necessity that it appear in a coroner's inquest, that it was taken by the oaths of persons of the next adjacent towns, but that it is sufficient to say, that it was taken by the oaths of lawful persons of the county, inasmuch as such inquisitions being good before the said statute, which is wholly declaratory, must needs be so still. But it (b) seems, that it ought to appear in every such inquisition, at what place, and by what jurors by name it was taken, and that such jurors were sworn; and that the reason given in some books that such inquests shall be intended to have been taken by the men of the next towns seems very harsh, if it be supposed necessary to be taken by such persons; for that such intendment would be contrary to the general rule of the law, which will not suffer any material part of an indictment to be taken by intendment.

Sett. 23. Also it is farther remarkable, that the statute doth not expressly say, that the coroner shall take his inquest on the view of the dead body, and that an inquest otherwise taken by him shall be void. And yet it is clearly agreed by all the books (c), that a coroner has no manner of power to take an inquisition of death without a view of the body; and that any such inquest taken by him without such view, is merely void. And for this reason it hath been (d) adjudged, that if a dead body, in prison, or other place, whereupon an inquest ought to be taken, be interred, or suffered to lie so long, that it putrify before the coroner hath viewed it, the gaoler or township shall be amerced. (4) Also it hath been (e) resolved, that a coroner may lawfully within convenient time, as the space of fourteen days after the death, take up a dead body out of the grave in order to view it, not only for the taking of an inquest where none hath been taken before; but also for the taking of a good one, where an insufficient one hath been taken before. (5) But if the body cannot be (f) found, or have lain so long before the coroner hath viewed it, that he can be no way assisted from the view in the taking of his inquest; or if there be danger of infecting

(a) F. Cor. 107. 1. Hale 58. S. P. C. 51. 2. Lev. 141. Lat. 166. Noy, 87. 2. R. 3. 2. 21. Ed. 4. 70. Summary 170. Pop. 209. (d) F. Cor. 329. 339. 421. S. P. C. 51. 1. Keb. 278. (e) 21. Ed. 4. 70. 2. R. 3. 2. 2. Hale, 58, 59. S. P. C. 51. Summary 170. Holt 167. B. Cor. 167. 173. (f) S. P. C. 51. Summary 170. 2. Lev. 141. Lat. 166. 1. Vent. 352. Pop. 209. Salk. 190. 1. Bac. Ab. Noy 87. 2. R. Ab. 96. 1. Roll. 217.

(4) It is indictable as a misdemeanor, Salk. 377. to bury one who dies a violent death before the coroner has sat upon him, 7. Mod. 10.

(5) So also he may dig up the body if the first inquisition be quashed. Str. 533. But it must be by order on motion of the king's bench, Stra. 167. And the judges will exercise their discretion according to the time and circumstances, whether he shall or shall not do it, Salk. 377. Strange 22. 533. 2. Mod. 16.

people

people in digging of it up, the inquest ought not to be taken by the coroner (unless he have a special writ or commission for that purpose), but by justices of peace or other justices authorized to inquire of, hear, and determine felonies, &c. who shall take the inquest on the testimony of witnesses. But none can take an inquest on view in any case, but the coroner.

Sett. 24. If a (a) coroner take an inquest after a body hath been so long buried, that it may reasonably be presumed that the view of it could be of no manner of use for the information of the jurors, the court into which the inquisition is returned will in discretion refuse to receive or file it, upon affidavit of the whole circumstances of the proceeding.

(a) *Rex v. Causey*, Hilary, 3. Geo. 1. Strange 22.

Sett. 25. (b) Yet it is not necessary, that the inquisition be taken in the very same place where the body was viewed; for it hath been resolved, that an inquisition taken at *D.* on the view of a body lying dead at *L.* may be good.

(b) *I. ar.* 166. See *Pop.* 209.

Sett. 26. As the coroner hath no power from the said statute, nor from 3. Hen. 7. c. 1. to inquire of any accessaries to a felony after the fact; so neither hath he any such power by the (c) common law; for he has nothing to do with any but those who some way or other caused the party's death: and therefore it hath been resolved, that an indictment of *J. S.* before a coroner for having received and comforted one who had been guilty of a murder, is void.

(c) 4. H. 7. 18. *F. Forfeit.* 10. 1. Hale 416. 2. Hale 63. S. P. C. 183. *Keilw.* 67. *Dalif.* 22. *Moor.* 29.

Sett. 27. But it is certain, that a coroner may inquire of the accessaries before the fact, as well as of the principals; and that he (d) also may enquire, whether in any such manner found to have been guilty, did fly for the offence; for which flight they forfeit all their goods and chattels.

(d) S. P. C. 183. 2. Lev. 141. 151. 2. Hale 63. 65. *Post.* l. 51.

Keilw. 68. Summary 170. B. Cor. 151. 8. Ed. 4. 4.

Sett. 28. Also it is (e) certain, that a coroner may and ought to inquire of all the circumstances of the party's death, and also of all things which occasioned it; and (f) therefore it is said, that if it be found by his inquest, that the person deceased was killed by a fall from a bridge into a river, and that bridge was out of repair by the default of the inhabitants of such a town, and that those inhabitants are bound to repair it, the township shall be amerced (6).

(e) *Keilw.* 67. 1. Hale 422. 2. Hale 62. (f) *Aleyn*, 31.

(6) So if the township bury the body before the coroner is sent for, the township shall be amerced, Hale 424.

6. P. C. 51.
Salk. 377.
Str. 69.
F. Cor. 292.
Summary 170.
1. Hale 424.
2. Hale 58.

Sect. 29. Also it is agreed, that if a coroner be remiss (7) in coming to do his office when he is sent for, &c. he shall be amerced (8) by virtue of the abovementioned statute *de coronatoribus*. Also it is farther enacted by 3. Hen. 7. c. 1. "That if any person be slain or murdered in the day, and the murderer escape untaken, the township where the said deed is so done, shall be amerced for the said escape, and that the coroner have authority to inquire thereof upon the view of the body dead: And that if any coroner be remiss and make not inquisitions upon the view of the body dead, he shall forfeit for every default an hundred shillings."

(7) If the coroner omit to take an inquisition upon an untimely death, it may be done by justices of gaol-delivery, oyer and terminer, or of the peace, but it must be done openly: and if it be done secretly it may be quashed. 1 Burr. 17.

(8) And if he impose an improper inquisition upon the jury, he may be committed. Strange 99. Vide post. sect. 58. where by 25 Geo. 2. c. 29. if he be convicted of extortion, wilful neglect, or misdemeanor, he may be punished and removed from his office. Vide also note to section 12.

As to the second particular, *viz.* What farther care must be taken by a coroner for the prosecution of the offender, after taking inquisition of death against him.

Sect. 30. It is farther enacted by the said statute of 3. Hen. 7. c. 1. "That after the felony found, the coroners deliver their inquisition afore the justices of the next general gaol-delivery, in the shire where the inquisition is taken, the same justices to proceed against such murderers if they be in the gaol, or else the same justices to put the same inquisitions afore the king in his bench. And if any coroner do not in such manner certify his inquisition, he shall forfeit an hundred shillings."

Sect. 31. By 1. and 2. Philip and Mary, c. 13. it is also enacted, "That every coroner, upon any inquisition before him found, whereby any person or persons shall be indicted for murder or manslaughter, or as accessary or accessaries to the same, before the murder or manslaughter committed, shall put in writing the effect of the evidence given to the jury before him, being material. And shall bind all such by recognizance or obligation, as do declare any thing material to prove the same, to appear at the next general gaol-delivery to be holden within the county, city, or town corporate where the trial thereof shall be, then and there to give evidence against the party so indicted at the time of the trial, and shall certify as well the same evidence, as such bond or bonds in writing, as

“ as he shall take, together with the inquisition or indictment before him taken and found, at or before the time of his said trial thereof to be had or made. And in case any coroner shall offend in any thing contrary to the true intent and meaning of this act, the justices of gaol-delivery of the shire, city, town, or place where such offence shall happen to be committed, upon due proof thereof, by examination before them, shall for every such offence set such fine on every such coroner, as they shall think meet, and estreat the same as other fines and amerciaments assessed before justices of gaol-delivery ought to be.”

Stat. 32. And by 1. Hen. 8. c. 7. “ If any coroner shall not endeavour himself to do his office upon any person dead by misadventure, he shall forfeit forty shillings.”

† Also by 25. Geo. 2. c. 29. s. 6. “ If any coroner who is not appointed by virtue of an annual election or nomination, or whose office of coroner is not annexed to any other office, shall be lawfully convicted of extortion, or wilful neglect of his duty, or misdemeanor in his office, it shall be lawful for the court before whom he shall be so convicted, to adjudge that he shall be removed from his office: and thereupon if such coroner shall have been elected by the freeholders of any county, a writ shall issue for the amercing him from his office, and electing another coroner in his stead, in such manner as already directed by law; and if the coroner so convicted shall have been appointed by lord or lords of any franchise or liberty, or in any other manner than by the election of the freeholders of any county, the lord or lords of such liberty or franchise, or the person or persons intitled to the nomination or appointment of any such coroner, shall upon notice of such judgment of amercial, nominate and appoint another person to be coroner in his stead.”

Vide ante s. 29.

As to the third particular, *viz.* What high credit the law gives to an inquisition of death found before a coroner.

Stat. 33. It seems (a) certain, that anciently the judges would not receive a verdict, acquitting a person of the death of a man found against him by a coroner's inquest, unless the jury so acquitting the defendant, had found at the same time what other person (8) did the fact, or by what other means the party came to his death; because it appeared by

(a) 1. R. 4. 37. Aff. 13. 11. H. 4. 93. 14. H. 7. 2. F. Cor. 213. Keilw. 686. S. P. C. 181.

(8) This is commonly a business of form; and if the fact be not known, the jurors usually say, that it was done by *persons unknown*. 2. Hale 301.

2. Hale 301.
Finch 415.
B. Appeal
42. 112.
B. Indict. 10.
35.
B. Cor. 32.
39. 52. 117.
(a) See the
books above
cited.

the coroner's view upon record, that a person was killed. But it is (a) agreed, that the judges cannot compel a jury to make such farther inquiry on an acquittal of a defendant from any other indictment, because it doth not in such manner appear of record by any such inquisition, that a person is dead. And it seems hard to reconcile the said practice of compelling a jury to find such farther matter with reason in any case, unless it appear in the course of the evidence by what other means, not mentioned in the indictment, the party lost his life. For it seems strange, that a jury should be in any case compelled to find a matter upon their oaths, which they have no evidence to support; and therefore if it no way appear to them, by what other means the death in question was occasioned, it seems difficult to maintain that it shall not be sufficient for them to declare so to the court.

Sec. 34. How high a credit is given by the law to a coroner's inquisition of self-murder, or of the flight of a person indicted for the death of another, will be more fully shewn in the three last sections of this chapter.

AS TO THE SECOND GENERAL POINT, *viz.* What authority a coroner hath to take an indictment of other matters.

(b) 35. H. 6.
27.
27. Aff. 55.
F. Cor. 206.
B. App. 111.
(c) S. P. C.
51.
(d) Summary
171.
2. Hale 65.
(e) 4. Inst. 171.
2. Inst. 147.
(f) See the
statute at
large.
(g) Britton 3.

Sec. 35. It is expressly said in some (b) books, that a coroner hath no power *ex officio* to inquire of any felony, but only of the death of a man upon view. And both *Staunford* (c) and *Hale* (d) seem to speak doubtfully of this matter upon the authority of those books; and *Sir Edward Coke* (e) seems expressly to declare his opinion, that a coroner hath no power to take an indictment in any other case. Yet since it is expressly declared by the above-mentioned statute *De officio coronatoris* (f) that a coroner ought to inquire of the breakers of houses; and it is said by *Britton* (g) that he may inquire of rape, and of the breach of a prison; and such power hath never been expressly taken from him; it seems hard to say, that he may not still make such inquiries if he please; for as to the authority of 27. Aff. 55. and 35. Hen. 6. pl. 27. b. which are cited for the maintenance of the contrary opinion, it may be answered, that this point is not resolved in either of those books, but only spoken of incidentally; for the very point resolved in the *Book of Affizes*, seems to be no more than this, that a coroner hath no power to take an indictment of an accessary after the fact; and that which is said in Year Book of *Henry the sixth* concerning this matter is only brought in by way of argument concerning a point of a quite different nature.

Sec. 36.

Sett. 36. However, there seems to be no doubt but that the coroner may and ought to inquire of *treasure-trove*, concerning which it is enacted by the said statute of 4. Edw. 1. *De officio coronatoris*, "that a coroner being certified by the king's bailiffs, or other honest men of the county, shall go to the places where treasure is said to be found." And it is farther enacted in the following part of the same statute in these words, "A coroner ought also to inquire of treasure that is found, who were the finders, and likewise who is suspected thereof. And that may be well perceived where one liveth riotously, haunting taverns, and hath done so of long time; hereupon he may be attached for this suspicion by four or six or more pledges, if he may be found." Bracton book 3. chapter 6.

Sett. 37. It is also said, that a coroner may inquire of royal fishes, as sturgeons, whales, &c. S. P. C. 51. Bracton 120.

Sett. 38. AS TO THE THIRD GENERAL POINT, *viz.* 2. Hale 66. How far a coroner is impowered to receive and proceed on a bill of appeal, I shall endeavour to shew—1st, How far he is authorized to receive such appeal—2dly, How far to proceed upon it; and in what manner it may be removed by *certiorari*.

As to the first of these particulars, *viz.* How far a coroner is authorized to receive an appeal.

Sett. 39. It appears clearly from the above-mentioned (a) statute of 4 Edw. 1. *De officio coronatoris*, and also from our ancient (b) law-books, that a coroner in the county-court may receive an appeal of any felony or mayhem, upon the plaintiff's finding sufficient pledges to the sheriff for the prosecution of the suit. And it is observable, that the said books generally mention the coroner as the person before whom such (c) appeal is to be commenced, without joining any other with him; from whence it seems clearly to be intimated, that the coroner is the (d) only person who hath a jurisdiction in this matter; and that at common law he might (e) receive such appeal without the concurrence of any other, as he certainly may the appeal of an approver, &c. But it being provided by the *statute of Westminster* 1. c. 10. that the sheriff shall have counter-rolls with the coroners, it seems, that no appeal since that statute is well commenced before the coroner, (f) unless the sheriff be also present, in order to take a counter-roll of the proceeding. But it seems, that the sheriff, by virtue of this statute, is no more a judge of the matter than he was before; and therefore, where it is said by the statute of 3. Hen. 7. c. 1. that an appeal of felony (a) See the statute at large. (b) Brac. 122, 147. Fleta 1. c. 25. Britton 5. S. P. C. 64. 22. Aff. 97-98. Finch 321. (c) Con. 17. Aff. 5. B. Appeal 56. Summary 171. S. P. C. 52. 64. (d) 4. Inst. 176. 4. H. 6. 16. B. Appeal 44. (e) Sum. 172. 2. Hale 67. (f) 39. H. 41. 4. H. 6. 16. Con. B. App. 44.

may be commenced before the sheriff and coroners of the county where it was done, it seems reasonable to intend the meaning of the statute to be, that it may be commenced before them in the same manner as before, and not without express (a) words to make any alteration of the jurisdiction given them by the common law.

(a) Qu. Staunford's Pleas of the Crown, 64.

(b) Summary 171, 172.
2. Hale 67.
S. P. C. 52, 53.
F. Corone 437.

Seft. 40. But it is (b) certain that a coroner hath no power to receive a bill of appeal of any offence done out of the county whereof he is coroner, because the offender cannot be tried by the county. But it is agreed, that he may receive the appeal of an approver, or take the abjuration of one who acknowledges a felony done by him in any county, because that after such confessions there is no need of any trial.

As to the second particular, viz. How far a coroner may proceed upon such appeal.

(c) See Dalt. Sh. c. 106.

2. Hale 56.

(d) 22. Aff.

97, 98.

Bracton 147.

Fleta c. 25.

2. Inst. 30, 31,

32.

2. Hale 67.

B. App. 56,

62.

B. Corone 82.

(e) S. P. C. 64.

Summary 171.

(f) Con. S. P.

C. 64.

Summary 171.

27. Affize 47.

(g) 22. Aff 97.

F. Cor. 184.

Con. B. App.

82.

Qu. B. App.

109.

S. P. C. 64.

Summary 171.

2. Hale 67.

Seft. 41. It seems (c) probable that before the statute of *Magna Charta*, c. 17. coroners might try offenders as well as receive accusations against them; but it is (d) agreed, that they cannot proceed so far since that statute, by which it is enacted, "that no sheriff, constable, coroner, or other bailiff of the king shall hold pleas of the crown."—Also it is agreed, (e) that process may be awarded in the county-court on such appeals till the exigent; but (f) it seems questionable, whether such process may properly be said to be awarded by the sheriff and coroner jointly, since the coroner being the only judge, as I have endeavoured to prove *seft.* 39. it seems to be most proper that the process be awarded by him only. Neither doth it seem clear, that the above-mentioned statute of *Magna Charta* doth restrain the coroner from awarding an exigent, and thereon outlawing an appellant; for since, as it is agreed by all, an offender might become attainted by an abjuration of a felony made before a coroner, why not as well by an outlawry pronounced by him? And accordingly we find it taken for granted in some of the old (g) books of the best authority since this statute, that appellees may be outlawed for not appearing on process before the coroner.

As to the third particular, viz. In what manner an appeal before the coroner may be removed by *certiorari*.

(b) S. P. C. 64.

Summary 171,

2. Inst. 176.

(i) 14 H. 4.

15. b. 16.

B. Appeal 44.

Seft. 42. There (b) is no doubt but that it may be removed either into the king's bench or chancery, by *certiorari* directed to the coroners and sheriff. But it hath been (i) resolved, that it cannot be removed by such writ directed to

2. Inst. 176. S. P. C. 64. 2. Hale 67. 70.

the

the sheriff only, because the coroner is the judge, and the sheriff hath only a counter-roll by virtue of the above-mentioned *statute of Westminster*, chapter the tenth.

As to THE FOURTH GENERAL POINT, *viz.* How far a coroner is authorized to receive and proceed on the appeal of an approver.

Señ. 43. There is no doubt but that the coroner alone may receive such appeal, (a) whether the offence were committed in the same or in any other county, and may also award process to the sheriff against the appellee, being in the same county, till it come to the *exigent*; and it (b) seems, that it may be probably argued, that he may award process even to an outlawry, as hath been more fully shewn in the forty-first section of this chapter. But it is certain, that he cannot award any process against an appellee in a foreign county, but must leave it to the (c) justices of gaol-delivery, or others, before whom the appeal is afterwards recorded, who shall award process against such appellees in such manner as shall be more fully set forth in the chapter concerning approvers, *sect. 22.*

(a) Summary 172.

2. Hale 67, 68 S. P. C. 53.

Ante *sect. 40.* (b) S. P. C. 73. Summary 172.

(c) S. P. C. 53, 73. Summary 172.

F. Cor. 462.

29. Ed. 3. 42.

As to THE FIFTH GENERAL POINT, *viz.* How far a coroner is authorized to take the confession and abjuration of a felon.

Señ. 44. There seems to be no doubt but that he may record the confession of the breach of prison by any felon, &c. and also the (d) confession of any felony by an approver: but the law relating to these matters being in a great measure obsolete, it seems needless over-nicely to inquire into it. Also it is certain that he might take an abjuration: but this not having been in use since 21. Jac. 1. c. 28. f. 6, 7. by which it is enacted, "that no sanctuary, or privilege of "sanctuary, shall be admitted or allowed in any case," I shall only touch upon it, and take notice, that at the common law, if a person accused of any felony except (e) sacrilege, (f) whether in the same or any other county, for which he was liable to judgment of (g) death, and not charged with (h) high treason, nor as (i) some say with petit treason, had fled to any (k) church or church-yard, and within (l) forty days confessed himself guilty before the coroner, and declared all the particular (m) circumstances of the offence, and thereupon taken the oath in the case provided, the (n) substance whereof was, that he abjured the realm, and would depart as soon

(d) Vid. 8. 36. & 49.

(e) F. Cor. 420.

S. P. C. 117.

3. Inf. 115.

(f) S. *sect. 40.*

(g) B. Cor. 183.

S. P. C. 123.

Finch 388.

(h) B. Cor. 181.

(i) S. P. C. 116.

(j) S. P. C. 118.

(k) S. P. C. 117.

(l) S. P. C. 119, 120, Finch 389.

Finch 389. S. P. C. 116. (i) S. P. C. 116, 117. B. Cor. 181. Finch 388. (k) S. P. C. 116. 3. Inf. 115. Finch 388. (j) S. P. C. 118. 3. Inf. 117. (m) S. P. C. 117. F. Cor. 54. 3. H. 7. 12. (n) S. P. C. 119, 120, Finch 389.

as possible, at the port which should be assigned him, and never return without leave from the king, &c.) he saved his life, if he observed the terms of the oath, by going with all (a) convenient speed the nearest way to the port assigned, &c. but he was (b) attainted of the felony by such abjur-
 ation without more, and consequently forfeited his lands and goods, &c.

(a) 7 H. 7. 7.
 B. Cor. 145.
 S. P. C. 121.
 (b) F. Cor.
 423.
 S. P. C. 122.

Finch 389. 3. Inst. 217.

As to THE SIXTH GENERAL POINT, viz. How far the act of any one coroner is as effectual as if it were done by all.

(c) S. P. C. 53. Sec. 45. It seems clear, that (c) wherever coroners are
 14. H. 4. 34. authorised to act as judges, as in the taking of an (d) inqui-
 (d) 2. Hale sition of death, or receiving an appeal of felony, &c. the act
 56. 58. of any one of them, who first proceeds in the matter, is of
 Vid. C. 1. f. 10. the same force as if all had joined in it: But it is said, that
 (e) 2. Hale after such proceeding by one of them, the act of any other
 59. 67. will be void, (e). Also it seems certain, that where coroners
 F. Corone 107. are impowered only to act (g) ministerially, as in the exe-
 S. P. C. 52. cution of process directed to them upon the default or inca-
 Summary 172. pacity of the sheriff, all their acts will be void wherein they
 S. P. C. 53. do not all join.
 14. H. 4. 34 & 35.
 39. H. 6. 40.
 6. 41, 42.

(g) One Coroner may execute the writ, as in case of an exigent; but if there be more coroners than one for the county, the return must be in the name of all. 2. Hale 56.

Book 1. c. 63. As to THE SEVENTH GENERAL POINT, viz. In what cases a coroner may lawfully take a fee for the execution of his office.

2. Inst. 176. Sec. 46. It is enacted by the statute of *Westminster the first*, c. 10. which was made in affirmance of the common law, "That no coroner demand or take any thing of any
 " man to do his office, upon pain of great forfeiture to the
 " king."

Vid. 2. Inst. 219. Sec. 47. But by 3. Hen. 7. c. 1. "A coroner shall have
 " for his fee upon every inquisition taken upon the view
 " of a body slain thirteen shillings and fourpence of the
 " goods and chattels of the slayer and murderer, if he have
 " any goods; and if he have no goods, of such amerciaments
 " as shall fortune any township to be amerced for the escape
 " of the murderer, &c."

Sec. 48. But coroners endeavouring to extend this statute to persons slain, by misadventure, it is enacted by 1. Hen. 8. c. 7. "That upon a request made to a coro-
 " ner to come and inquire upon the view of any person
 " slain,

“ slain, drowned, or otherwise dead by misadventure, the
 “ said coroner shall diligently do his office, without taking
 “ any thing therefor, upon pain to every coroner that will
 “ not endeavour himself to do his office (as afore is said),
 “ or that taketh any thing for doing of his office, upon
 “ every person dead by misadventure, for every time forty
 “ shillings.”

† *Sec. 49.* To the intent, however, that coroners may be encouraged to execute their office with diligence and integrity, it is enacted by 25. Geo. 2. c. 9. “ That for every inquisition, not taken upon the view of a body dying in a gaol or prison, which shall be duly taken in England by any coroner or coroners in any township or place contributing to the rates directed to be levied by 12. Geo. 2. c. the sum of twenty shillings; and for every mile which he or they shall be compelled to travel, from the usual place of his or their abode, to take such inquisition, the further sum of ninepence over and above the said sum of twenty shillings, shall be paid to him or them out of the monies arising from the rates before-mentioned, by order of the justices of the peace in their general or quarter sessions assembled for the county, riding, division, or liberty where such inquisition shall have been taken, or the major part of them; and which order they are hereby directed to make without fee or reward.”

† *Sec. 50.* And by 25. Geo. 2. c. 9. s. 2. “ For every inquisition which shall be duly taken upon the view of a body in any gaol or prison in England, by any coroner or coroners of a county, so much money not exceeding the sum of twenty shillings shall be paid to him or them, as the justices of the peace in their general or quarter sessions assembled for the county, riding, or division, wherein such gaol or prison is situate, or the major part of them, shall think fit to allow as a recompence for his or their labour, pains and charges, in taking such inquisition, to be paid in like manner, by order of the said justices, or the major part of them, out of the monies as aforesaid.”

† *Sec. 51.* And by 25. Geo. 2. c. 9. s. 3, 4, 5. it is provided, “ that over and above the recompence hereby limited and appointed, the coroner or coroners shall also have the fee of 13s. 4d. payable by virtue of 3. Hen. 7. c. 1.”— “ That no coroner to whom any benefit is given by this act shall by colour of his office, or upon any pretext whatsoever, take for his office, doing as aforesaid, other than the said fee of 13s. 4d. and the recompence hereby limited and appointed, upon pain of being deemed guilty of extortion.”— “ That no coroner of the king’s household,
 1 4 and

“ and of THE VERGE of the king’s palaces, nor any coroner
 “ of the admiralty, county palatine of *Durham*, city of *Lon-*
 “ *don*, and borough of *Southwark*, or of any franchises be-
 “ longing to the said city; nor any coroner of any city,
 “ borough, town, liberty, or franchise, which is not con-
 “ tributing to the rates directed by 12. Geo. 2. c. or within
 “ which such rates have not been usually assessed, shall be
 “ intitled to any fee, recompence, or benefit given to, or
 “ provided for, coroners by this act.”

As to THE EIGHTH GENERAL POINT, viz. In what cases
 a matter recorded by, or found before, a coroner, admits of
 no traverse:

I shall consider the same in relation, 1st, to abjurations or
 confessions made before him; 2dly, to escapes; 3dly, to
 flights; and 4thly, to self-murders.

As to the first particular, viz. That relating to *abjurations*.

(a) Sum. 171. *Self. 52.* It is said, that a coroner’s record of an (a) abjuration
 F. Cor. 124. or of the confession of (b) breaking prison, or of the confes-
 S. C. 52. sion of a felony by an (c) approver, is of so great authority,
 (3) S. P. C. 32. as not only to estop the party from taking any traverse to
 25. E. 3. 42. his having made such confession, but also from alledging
 pl. 35. that what was said by him was extorted by duress, or other
 F. Corone 134. unfair means. Also it seems, that if the party plead, that
 (c) F. Cor. he is not the same person who abjured, &c. and the (d)
 118. 169. coroner record that he is the same person, such record is
 12. Affize 29. conclusive, &c. But in these (e) cases it seems, that the
 (d) F. Cor. judge, for the better information of his conscience, may in
 124. his discretion, if he think fit, take an inquiry from the peo-
 S. P. C. 52. ple living next to the place, of the whole circumstances of
 (e) F. Cor. the matter, &c.
 118. 124. 169.
 12. Affize 29.
 B. Corone 75.

As to the second particular, viz. That relating to *escapes*
 found before a coroner.

(f) S. P. C. *Self. 53.* It is (f) said, that if it be found by a coroner’s
 34. 35. 163. inquest that a murder was committed in such a town, and
 that the murderer escaped untaken, the township cannot tra-
 verse such escape, because it makes them only liable to an
 amerciamcnt, *et de minimis non curat lex*.

As to the third particular, viz. That relating to a *flight*
 found before a coroner.

Self. 54. It seems, that if a person indicted of a murder
 by a coroner’s inquest, be also found to have fled for it, and
 afterwards

afterwards upon his trial be (a) acquitted of the murder, and also found not to have fled for it; yet he shall forfeit his goods, because such a finding that he did not fly by a jury, who, as some say, had nothing to do with it, and ought not to have been charged with such inquiry, shall not controul the coroner's inquest, which is of such authority, that immediately upon the flight, the party's goods shall be delivered to the township, which shall be answerable for them. Also it seems (b) generally to be taken for granted, that the party has no remedy whatsoever to traverse such flight found against him by a coroner's inquest; for that such inquest is of very great authority, (c) inasmuch as all persons of the neighbouring towns above the age of twelve years, are bound to attend at the taking of it; and yet I cannot find any direct resolution settling this point; but, on the contrary, it is certain that *Sir William Staundford* makes a *quære* of it; and the reason above-mentioned, which is brought to support the great credit of such inquests, holds as strongly against the traversing them as to the point of the offence, in which respect it is at this day generally holden that they may be traversed, as will be more fully shewn in the next section. And surely the other reason which is given for this opinion, that the party only forfeits his chattels by such finding, and therefore shall not traverse it, because the law reckons chattels among those *minima de quibus non curat lex*, is very harsh and unaccountable; and it is very hard to say, that a man shall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an (d) inquest taken in his absence, without either hearing him, or giving him an opportunity of defending himself.

As to the fourth particular, *viz.* That relating to *self-murder* found before a coroner.

Señ. 55. It is holden strongly in some (e) books, that no inquest of this kind admits of any traverse. But the contrary opinion being also holden by (f) books of as great authority, and seeming also to be more agreeable to the general tenor of the law in other cases, it seems to be the better opinion, that such inquest, being moved into the king's bench by *certiorari*, may be there traversed by the executor or administrator of the person deceased, and perhaps also by the king, or the lord of the manor, &c.

3. Keb. 564, 566. 604. 800. (f) See the books above cited, *Rex v. Roupel*, Cowp. 458. and *Rex v. Heaton*, 2. Term Rep. 184.

(a) 13. H. 4. 13. 6.
F. Forfeit 29, 32. 35.
1. Hale 363.
5. Co. 109.
Dyer 238.
Summary 271.
1. Hale 363.
2. Hale 154.
(b) B. Cor. 151.
8. E. 4. 4.
2. Lev. 141.
B. Trav. 229.
3. Keb. 564, 566.
1. Hale 363.
414, 415. 417.
2. Hale 63, 64, 301.
(c) 2. Inst. 147, 148.
3. Keb. 306.
1. Hale 363.

(d) 3. Inst. 55.
2. Levinz 141.
Summary 29.
1. Vent. 181, 182.

(e) 8. Ed. 4. 4.
b. 1. c. 27. sect. 11. & the books there cited.
B. Cor. 151.
2. Lev. 141. 152.
2. Keb. 859.
2. Sid. 90.
101. 144.
2. Jon. 198.
1. Ven. 278.

If however no matter be depending before the court to make it necessary, the king's bench will not order the coroner to return the depositions he has taken upon an inquisition of *felo de se*.

See the case of the coroner of Westminster, 2. Stra. 1073.

(a) Eliz. 371. *Sett.* 56. Also if it (a) appear, that a coroner hath been guilty of any corrupt practice in the taking of an inquisition, it seems that a *melius inquirendum* shall be awarded for the taking of a new one by special commissioners, who shall not proceed on the view of the body but on the testimony of witnesses; and the coroner shall have nothing to do in the taking such new inquest, because it appears from his former misbehaviour, that he is not fit to be trusted. But (b) where his inquisition is quashed for a defect in point of form only, he may and ought to take a new one, in like manner as if he had not taken any before.

3. Keb. 800. 856. 1. Modern 82. Salkeld 190. Carthew 72. 2. Keb. 859. 1. Ven. 181, 182. 352. 3. Mod. 80, 100, 238. Con. 2. Jones 198. (b) 2 R. Ab. 32. Ed. 4. 70. b. Salk. 190. 2. Hale 59, 69. 1. Hale 415. 2. Anderson 204. Strange 69.

The Coroner also possesses a ministerial office as the sheriff's substitute. For when just exception can be taken to the sheriff for suspicion of partiality (as that he is interested in the suit, or of kindred to either of the parties), the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs, 4. Inst. 271. 1. Comm. 349.

CHAPTER THE TENTH.

OF THE SHERIFF'S TORN.

THE sheriff's torn is the king's court of record, holden Finch 241.
before the sheriff for redressing of common grievances F. N. B. 82.
within the county. 2. Hale 70.

For the better understanding the nature whereof I shall examine the following points,

First, The original institution of this court.

Secondly, At what time and in what place it must be holden.

Thirdly, What persons owe suit to it.

Fourthly, What authority the sheriff (or his steward) hath as judge of it.

Fifthly, What kind of offences are inquirable in it.

Sixthly, Within what place such offences must arise.

Seventhly, By what jurors and in what manner indictments in it ought to be found.

Eighthly, In what manner they are to be proceeded upon.

Ninthly, In what manner they are to be traversed and determined.

As to THE FIRST POINT, viz. The original institution of the sheriff's torn.

Secd. 2. It is observable that by the (a) common law, (a) 9. Co. every sheriff ought to make his torn or circuit throughout Preface. every hundred in his county twice in the year, in order to Dalt. Sher. hold a court in every such hundred for the reformation of 385. common grievances, and the preservation of the peace and Mag. Char. 35. good government of the kingdom. For which purpose all 2. Inst. 70, 71. the (b) inhabitants of such hundreds, being above the age of 73. 122. B. Lect. 42. Britton 71.

(b) See the books above cited, Fleta b. 1. c. 27. Bracton 124. 2. Inst. 121. Lamb of Constaibles 8, Keil. 141. 4. Inst. 259. 2. Hale 69. 4. Comm. 270.

twelve years, and not specially privileged, in such manner as shall be more fully set forth under the third point, are bound to attend at such courts, in order to make inquiries of all such offences; and also to give security to the publick for their good behaviour, by taking an oath to be faithful to the king, and to observe his laws, and also by incorporating themselves into some free-pledge or tithing, which formerly signified a certain number of families living together in the same precinct, the masters whereof were every one of them mutually bound for each other, and punishable for the default of any member of any such family, in not appearing to answer for himself, on any accusation made against him,

§. Inst 71, 72. *Sett.* 3. And the better enforcing of this order seems
Dalt. Sher. 385. 129. anciently to have been the principal end of holding this
F. Leet 11. court, the style whereof even to this day must be *Curia visus*
Mirror c. 1. f. *franci plegii domini regis tenta apud C. coram vicecomite in turno*
13. & 16. *suo tali die, &c.* But it hath been resolved, that the law doth
not take notice of any such court under the style of *turn*
vicecom' tent. tali die; for the word "torn," properly taken,
doth not signify the sheriff's court, but his perambulation.

As to THE SECOND POINT, *viz.* At what time and in what place this court is to be holden.

6. H. 7. 2. *Sett.* 4. It is said, that at the common law it might be
Dalt. Sher. 390. holden at any place within the hundred, and as often as the
Con. Coke 390. sheriff thought fit. But this having been found to give the
Lit. 115. sheriff too great a power of oppressing the people, by holding
Kitchen 44. his court at such times and places at which they could not
Dalt. Sher. conveniently attend, in order thereby for his own advantage
390. to increase the number of his amercements, it was enacted by
the statute of MAGNA CHARTA, 35. "That no sheriff or
See Harg. Co. "his bailiff shall make his torn through a hundred but
Lit. 117. "twice in a year, and at the place accustomed, *viz.* once
note (11.) "after *Easter*, and again after the feast of *St. Michael*; and
"that the view of frank-pledge shall be at the term of *St.*
"Michael."

Sett. 5. And it is farther enacted by 31. Edw. 3. c. 15.
"That every sheriff shall make his torn yearly, one time
"within the month after *Easter*, and another time within
"the month after *St. Michael*; and if they hold them in
"other manner, that then they shall lose their torn for the
"time."

Sett. 6.

Sec. 6. And it seems (a) certain, that since these statutes, the sheriff is indictable for holding this court at another time than what is therein limited, or at an unusual place.

(a) Dyer 141.
Keilw. 192.
Dalt. Sher.
390.

Sec. 7. Also it hath been (b) resolved, that an indictment found at a sheriff's torn appearing to have been holden at another time, is void.

(b) 38. H. 6. 7.
2. H. 7. 2. b. 3.
S. P. C. 84.
2. Hale 70.

2. Dalt. Abr. 256. 2. Inst. 71. 2. Saund. 290.

Sec. 8. But it is observable, that neither of these statutes do expressly mention a court-leet, and therefore it is said in some (c) books, that they do not extend to it; neither do I find any resolution, that an ancient court-leet holden at any other time, or at an unusual place, is void. But on the contrary it is (d) said, that a court-leet may be holden at any place within the precinct which the lord thinks fitting. And it seems to be (e) agreed, that a prescription to hold such court oftener than twice in the year is good; which seems hardly reconcilable with the general rule of law, that no prescription can stand good against a statute which has negative words, if a court-leet be construed to be within the purview of the above-mentioned statutes. It is true indeed, that both *Sir Edward Coke* and *Kitchen* endeavour to solve this difficulty by offering a distinction, that the said rule extends not to statutes made in affirmance of the common law; but it is questionable how far this will amount to a good answer, since it seems to be holden by (f) others of good authority, that the said statutes were not made in affirmance of the old law, but are introductory of a new one; yet it is certainly safest to hold a court leet at the times accustomed, for it is (g) said, that if it be holden at an unusual time it is void. And it (b) seems, that no court-leet granted since the statute, can be holden at any other time than what is limited by it, because every such court is derived out of the torn, to which the statute certainly did extend.

(c) B. Leet 23.
2. Leon. 74.
1. Roll. 201.
(d) 8. H. 7. 4.
Kitchen 44.
Owen 35.
Dallson 61.
(e) Co. Lit.
115.
Kitch. 8. 44.
C. Eliz. 125.
245.
1. Roll. 201.

(f) Dalt. Sher.
390.
6. H. 7. pl. 2.
(g) 38. H. 6. 7.
B. Leet. 2.
B. Leet 32.
2. Saund. 291.
(b) C. Eliz. 245.
Con. 2. Inst. 72.
2. Saun. 291.

Sec. 9. It hath been (i) holden, that in every caption of an indictment taken in a sheriff's torn, or court-leet, the day whereon it was taken ought to be set forth, that it may appear not to have been on a Sunday.

(i) 2. Keb.
731.
1. Ven. 107.
2. Saund. 290.

As to THE THIRD POINT, viz. What (k) persons owe (k) suit to the sheriff's torn.

Sec. 10. It is certain, that regularly all persons above the age of twelve years are by the common law bound to appear at this court in their proper persons, and that no persons so bound

to

(a) 1. Inf. 99. to appear are within the benefit of the *statute of (a) Merion*, c. 10. which allows suit-service to be performed by attorney. And that not only masters of families, but also all their servants, are bound to pay such suit, and that every (b) master may be amerced for suffering a servant to continue with him a year and a day without being put into the decennary, &c.

(c) F.N.B. 161. *Seff. 11.* But (c) tenants in *ancient demesne* are privileged by the common law from coming to this court, unless they and their ancestors have time out of mind used to come to it. Also (d) *parsons* of churches have the like privilege by the common law; and all (e) *peers* of the realm and women have the same privilege by the *statute of Marlebridge* c. 10. (and perhaps by the common law), unless their presence be especially required for some particular cause.

(d) F. N. B. 160. 161. Dalt. Sher. 387. 2. Inf. 121. Qu. B. Leet 38. Doug. 190. (e) F. N. B. 160. 161. Dalt. Sher. 387. 2. Inf. 121. Register 175. (f) 2. Inf. 120, 121. Register 175. F. N. B. 160, 161. Dalt. Sher. 386. Brafton 124.

(f) Reg. 175. *Seff. 12.* Also it seems (f) clear that by the common law, as well as the said *statute of Marlebridge*, c. 10. no man can be obliged to do suit to any such court, within the precincts whereof he doth not reside, in respect of any lands which he may have within the jurisdiction of it; for that no suit of this kind is due in respect of the tenure of any lands, but only in respect of the personal residence of the party. And (g) if a man have a house which stands upon the precincts of two leets, it is said, that he shall do his suit to the court within the jurisdiction of which his bed-chamber lies. And if (h) one have a house and family in two leets, it seems that he ought to do his suit to that wherein for the most part he personally resides, but no man can be of two leets; and therefore one who lives within a (i) private leet, cannot be obliged to do suit to the sheriff's torn, or to any other grand leet, unless such private leet, for some default of the lord, be seized into the king's hands, or (k) unless the lord of the leet neglect to hold his court.

(g) 2. Inf. 122. Dalt. Sher. 387. (h) 2. Inf. 122. Dalt. Sher. 387. (i) 2. Inf. 122. Sec 19. H. 6. 1. 33. H. 6. pl. 9. (k) C. J. 584. Finch 246. Dalt. Sher. 388. 2. Hale 70. Douglas 537.

As to THE FOURTH POINT, *viz.* What authority the sheriff (or his steward) hath as judge of this court, I shall consider the same in relation, 1st, to indictments; 2dly, to fines and amercements in general; and, 3dly, to the appointment of constables.

As to the first of these points, *viz.* What authority the sheriff or steward of the torn has in relation to indictments.

Seff. 13. It seems, that by the common law he might proceed to (i) hear and determine any offence within his jurisdiction, being indicted before him and requiring a trial. But it is clear, that he is restrained from this power by the statute of MAGNA CHARTA, c. 17. by which it is enacted, "That no sheriff, constable, or other bailiff of the king, shall hold

(i) Dalt. Sher. 400. 2. Hale 69.

“hold pleas of the crown.” And it seems, that this statute also extends to the (a) stewards of courts-leet, who cannot deliver any persons indicted before them of felony, but must refer them to the justices of gaol-delivery; neither can they try any person indicted before them of any other offence; and therefore there is no remedy to avoid such presentments before them as are traversable, but by removing them into the king’s bench, &c. (b) as will be more fully shewn under the ninth point.

(a) 1. Inst. 38. Dalt. Sher. 400. 2. Hale 71.
(b) 2. H. 4. 17. B. Leet 11.
27. H. 8. 2. Kitch. 22, 23. Summary 175. 1. Ed. 3. c. 17. See Rex v. Roupel. Cowp. 458. and Rex v. Heaton, 2. Term Rep. 184.

Sec. 14. But it is certain, that the above-mentioned statute of MAGNA CHARTA doth neither restrain the sheriff’s torn, nor the court-leet, from taking *indictments* or *presentments*, or awarding process thereon in the same manner as before (c); but this power of awarding such process having been abused by the sheriffs in their torns, (d) was taken from all of them (except those of London), but not from any court-leet, by 1. Edw. 4. c. 2. which is more fully set forth under the eighth general point of this chapter.

(c) Kitch. 42. Finch 386. 1. Ed. 3. c. 17. See Sir George Colebroke v. Eliot 3. Burr. 1861.

As to the second point, *viz.* The sheriff’s authority in his torn in relation to fines and amercements, I shall consider,—1st, In what cases he may, and in what manner he ought to impose a fine.—2dly, In what cases he ought to award an amercement.—3dly, In what manner such amercement is to be awarded and affected.—4thly, In what manner such fine or amercement is to be recovered.—5thly, What farther penalty may be added to such fine or amercement.

2. Hale 69. (d) Dalt. Sher. 400, 401. 2. Hale 71.

As to the first particular, *viz.* In what cases and in what manner he ought to levy a fine.

Sec. 15. It seems clear, that the sheriff’s power in this court is still the same as anciently it was, in all cases not within either of the above-mentioned statutes of MAGNA CHARTA, or 1. Edw. 4. c. 2. from whence it follows, that he still continues a judge of record, and may impose a fine on all such as are guilty of (e) any contempt in the face of the court. Also there seems to be no doubt, but that he may impose what reasonable fine he shall think fitting, upon a (f) suitor refusing to be sworn, or upon a (g) bailiff refusing to make a panel, &c. or upon a (h) tithingman neglecting to make his presentment, or upon one of the jury (i) refusing to present the articles wherewith they are charged, 38. b. 39.

(e) Book 2. sect. 11. Ante 4. l. 15. (f) F. Leet 11. Dalt. Sher. 400. 2. Inst. 142, 143. 44. E. 3. 19. (g) 7. H. 6. 13. (h) 10. H. 6. 7. 8. Co. 38. (i) See 8. Co. charged, 38. b. 39.

(a) 8. Co. 38. charged, or upon a person duly chosen (a) constable refusing to be sworn.
Dalt. Sher. 400.
Dyer 211. Dalt. Sher. 401.

(b) 1. Roll. *Sec. 16.* But it hath been (b) resolved, that all such fines ought to be severally imposed on each particular offender, and not jointly upon all of them, except where a whole vill is to be fined; in which case, for the necessity of the thing, a joint fine upon all is good.
33. 73.
11. Co. 42, 43.
Dyer 211.

As to the second particular, *viz.* In what cases the sheriff in his torn ought to award an amercement.

(c) Dalt.
Sher. 400.
F. Leet 11.
1. Co. 39, 40.
Kitchen 43.
(d) B. Leet
Keilw. 66.
Skinner 392.
Finch 468.
Kitchen 51,
52.
(e) F. Torn, 4.
8. E. 4. 5.
Dalt. Sher.
401.

Sec. 17. It seems that he hath a discretionary power (c) either to award a fine or amercement for contempts to the court, as for a suitor's refusing to be sworn, &c. Also there seems to be no doubt, but that at the common law he might, as the steward of a court leet still may, award an (d) amercement of any person indicted for an offence not capital within his jurisdiction, without any farther proceeding or trial. And it seems to be taken for granted in (e) some books, that he might in such cases impose a fine on the offender, if he thought fit; and the statute of 1. Edw. 4. c. 2. which restrains him from levying any fines or amercements on indictments found before him, clearly supposes him to have had a power of imposing such fines; from all which it seems probable, that in such cases he had, and that the steward of a court-leet still hath a power, either to amerce or fine the offender, especially if the (f) crime were any way enormous, as an affray accompanied with wounding, &c.

(f) 8. Ed. 4. 5.

As to the third particular, *viz.* In what manner such amercement is to be awarded and affected.

Sec. 18. It seems, that if by an amercement be meant the judgment, that the party shall be in *miseriordia domini regis*, this being a (g) judicial act, ought to be the act of the court only, and requires not the concurrence or assent of the jury or any other, as appears from the constant form of all entries. Neither do I see any reason why such an award of a *miseriordia* by a judge of a court-leet, should express any certain sum for which the party should be in *miseriordia*, except in such cases only where no other person is afterwards to affect it; for in other cases the award of a *miseriordia* is only in order to authorize others to fix the sum which the party is to pay to the king for his default; and in such (b) cases the courts of *Westminster-hall* never do more than award that the party be in *miseriordia*, without mentioning any sum in certain; and there seems no reason why the judge of a court-leet should not follow the same rule;

(g) 1. Jones
301.
C. Car. 275.
8. Co. 38. 40.

(b) 8. Co. 40.
Raf. Ent. 553.
606.
F. N. B. 76.

rule; and accordingly I find the opinion of the lord chief justice (a) *Hobart*, which is the chief ground of a resolution in *Levinz's* third report, (b) that every such award of an amercement must express a certain sum, (c) over-ruled of late by the court of king's bench.

(a) *H. b.* 129.
1. R. Abr. 542.
(b) 3. Lev. 206.
3. M. d. 138.
(c) *Salkeld* 56.
Vide 3. Burr. 1860.

Sett. 19. But if by an amercement be meant, the taxing, or reducing to a certainty, the sum to be paid by the party to the king, upon the award of his being in *miseriordia*, it (d) seems, that if it be for an offence indicted, it ought to be done by certain officers called *affeerors*, being specially chosen and sworn for this purpose. It is true (e) indeed, that the common entry of an amercement upon a presentment in a court-leet is, that the party be amerced, or in *miseriordia* to such a sum; without distinguishing between the award of the *miseriordia* and the assessment of the amercement, or shewing by whom they are made; yet in judgment of law the award of the *miseriordia* is the act of the court only, and the assessment of the sum to be paid, the act of the *affeerors*, and so it ought to be pleaded. But if the (f) amercement be for a contempt of the court, it may be settled by the judge himself, and needs no other *affeerment*; for the (g) judge of every court of record is the most proper judge of all contempts offered to such court; and an amercement of this kind is in (h) nature of a fine, and called so in some (i) books; and it seems to be a general (k) rule, that no fine for a contempt is within the statutes which require that amercements be *affeered*.

(d) 8. Co. 40.
1. Lev. 206.
Raff. Ent. 606.
Kitchen 46.
Keilwood 66.
3. Keble 362.
(e) Kitchen
51, 52, 53.
(f) Raff. Ent.
151.
7. H. 6. 12.
10. H. 6. 7.
(g) 8. Co. 40, 41.
2. Leon. 242.
3. Mod. 138.
(h) B. Amer.
50.
(i) Sav. 93.
Co. Ent. 572.
8. Co. 38.
Raffal 553.
8. Co. 38, &c.
2. Inst. 96.
(k) Magna
Charta 14.
W. 1. 18.

As to the fourth particular, *viz.* In what manner such fines and amercements are to be recovered;

Sett. 20. It seems that the king or lord have an election of common right, either to distrain for them, (l) or to bring an action of debt.

(l) Raff. 151.
553. 606.
2. H. 4. 24.
10. H. 6. 7. C. Eliz. 581. Raym. 68. Sav. 93, 94.

For the better understanding of the nature of which remedies, I shall first lay down some rules concerning both of them in common, and then descend to each of them in particular.

As to what concerns the said remedies in common, I shall lay down the following rules:—

Sett. 21. FIRST, That it is safest in every avowry, or declaration of this kind, expressly to (m) shew that the offence was committed within the jurisdiction of the court. For if it were not, all the proceedings were *coram non judice*, and

(m) *Hobart*
129.
Raff. 553.
Co. Ent. 572,
573.

a court shall not be presumed to have a jurisdiction, where it doth not appear to have one. But perhaps it is not necessary

- (a) Hob. 129. to alledge in the presentment itself, that (a) the offence arose within the jurisdiction of the court; yet it is certainly advisable to have such an allegation, and that (b) perhaps may supply the want of the averment of jurisdiction in the pleadings.

Scff. 22. SECONDLY, That it is (c) advisable expressly to alledge, that the offence was committed as well as that it was presented, &c.; yet I cannot find any express opinion to this purpose; but on the contrary, it is observable, that the (d) precedents of pleadings of this kind in the best authors, do not expressly aver that the offence was committed, but only that it was presented, and that it arose in such a place within the jurisdiction of the court, &c. It is true, indeed, that it hath been generally (c) holden, that in an avowry or declaration for an amercement in a court-baron, it is as necessary to alledge that the offence was committed, as that it was presented. But to this it may be answered, that a court-baron is not a court of record, and consequently not of so high authority as the sheriff's torn or a court-leet; neither are presentments in a court-baron, nor even in any other court whatsoever, so highly credited by the law as those made in a torn or leet, which admit of no traverse to the truth of them, except in some special cases, as will be more fully shewn under the ninth general point of this chapter.

- (f) Keilw. 66. *Scff. 23.* THIRDLY, That it is safest in (f) setting forth a presentment, or an affectment of an amercement, to shew the names of the presentors and affectors; yet I cannot find this done in any of (g) *Rastal's precedents*; and some have said, that it is necessary to set forth the names of the presentors in an *action of debt*, but not in *replevin*.

Scff. 24. FOURTHLY, That it is advisable to shew that proper (b) notice was given of the holding of this court; yet this I find omitted in some (i) precedents; and perhaps the contrary opinion may be the better, for that every court of record shall be presumed to observe all necessary previous incidents for the holding of it, and all persons within its jurisdiction shall be intended to have notice of it. And for the like reason perhaps, it is not necessary in an avowry for a (k) distress for such fine or amercement, to shew that the party had previous notice what it was.

As to the recovery of such fines and amercements by way of distress, I shall observe,

Scff. 25.

Sec. 25. FIRST, That it seems to be (a) settled at this day, that a distress is incident of common right to every fine and amercement in a sheriff's torn or court-leet, whether the same belong to the king or a subject, if the offence for which they were imposed be of common right incident to the jurisdiction of such courts; but (b) if such offence be only the neglect of a duty created by custom, it is questionable whether it do not require the like custom for a distress, though the duty be of a public nature; but if it be for the (c) private benefit of a subject, it seems clear, that no distress is incident to it without a special custom.

2. Keb. 701. 739. 745. (c) 1. Roll. 76. 11. Co. 44.

Sec. 26. SECONDLY, That the sheriff, or lord of a leet, may for such fines and amercements distrain the goods of the offender in (d) any lands within the county or precinct of the leet, of whomsoever they shall be holden, except (e) only in such lands which shall be in the king's hands; for that all such lands, while they continue in the king's possession, are wholly out of the jurisdiction of such courts.

1. R. Abr. 670. 2. Infl. 104. (c) 47. Ed. 3. 12, 13. F. Distr. 15. 1. R. Abr. 670.

Sec. 27. • THIRDLY, That such a distress may lawfully be taken in the (f) highway; for that the *statute of Marlebridge*, c. 15. which prohibits the taking of a distress there, is to be intended only of distresses taken for services due by way of tenure of lands.

Sec. 28. FOURTHLY, That such fines and amercements, being for a personal offence, no (g) stranger's beasts can lawfully be distrained for them, though they have been *levant et couchant* on the lands of the offender.

F. N. B. 100. Owen 146. Noy 20. Con. 1. R. Abr. 669.

Sec. 29. FIFTHLY, That it seems to be (h) agreed, that where any such court is in the king's hands, the goods distrained for such fines and amercements may lawfully be sold after they have been kept a reasonable time, as the space of sixteen (i) days; and it seems the better (k) opinion, that where any such court is in the hands of a common person, if the goods were distrained for an offence of a public nature, they may be sold of common right, without any special custom for that purpose.

Sec. 30. SIXTHLY, That no bailiff can lawfully distrain for any such fine or amercement, without a special (l) warrant

C. Eliz. 698. 748. Moor 574. 607. 2. Keb. 745. Salkeld 108.

for so doing, which must be set forth by him in a ~~aff~~ ^{aff}swowry or justification of such a distress (1).

(1) And in replevin it must be averred, "that the defendant was guilty," but in trespass the conviction is sufficient to justify the officer. The amercement also must appear to have been by the court and not by the jury. Strange 847.

Seft. 31. As to the recovery of such fines and amercements by action of debt, being scarce able to find any thing remarkable concerning this matter, except what hath been already taken notice of, I shall content myself with this one observation, that the defendant shall (a) not be suffered to *wage his law* in an action, because it is grounded on the act of a court of record.

(a) 10. H. 6.

7.

Co. Lit. 295.

F. Lev. 5. 43.

2. R. Abr. 106.

4. Com. Dig.

See also 2. Lord Ray. 1173. 2. Burr. 1259. 1. Willf. 248. 2. Willf. 20. "Leet." (O. 10.)

As to the fifth particular, *viz.* What farther penalty may be added to such fines and amercements.

Seft. 32. 'There seems to be no doubt, but that upon a presentment of a common nuisance in a torn or leet, the sheriff or steward may either amerce the person presented, and (b) also order him to remove the nuisance by such a day, under pain of forfeiting a certain sum, or may order him to remove it under such a pain (c) without amercing him at all. But it seems doubtful, whether such person be bound at his peril to take notice of and obey such order, being made in his (d) absence, unless express notice be given him of it; but if he have such notice, it seems clear, that he shall forfeit the pain upon a presentment at another court, that he hath not removed such nuisance, (e) without any farther proceeding: Also it seems, that no such pain can be affected to any (f) lesser sum than what is at first set; and it is said, that every such pain, when forfeited, may be recovered (g) either by distress or action of debt, in the same manner as a fine or amercement may be: And this point seeming to be agreed by most of the books cited in the margin, it seems probable, that the reason of the judgment is mistaken in the case of *Fletcher v. Ingram*, as reported by *Mr. Sergeant (h) Salkeld*, wherein the contrary opinion is said to have been holden.

(b) See Kitch.

51, 52, 53, 54.

(c) Co. Ent.

57.

1. R. Abr.

46.

Cro. Jac. 382.

(d) 1. R. Abr.

468.

2. R. Abr. 136.

1. Roll. 20.

Alevn 78.

5. Mod. 130.

(e) Co. Ent.

573.

(f) 3. Leon. 7, 8.

Moor 75.

Co. Ent. 573.

B. Lect 37.

(g) 8. Co 41.

Keilwood 65.

C. Jac. 382.

1. Roll. 201.

1. R. Abr. 468.

Con. B. Lect 37.

K. B. 128. 214.

(h) Salkeld 175. See 5. Mod. 96. 130. Carthew 73. Barnard. Fitzg. 46. 109.

CHAPTER THE TENTH.

CONTINUED.

OF

THE SHERIFF'S TORN,

AS TO

THE APPOINTMENT OF CONSTABLES.

BEFORE I come to the third point, *viz.* The authority of THE SHERIFF as judge of the torn, in relation to the appointment of constables, I shall in brief premise some considerations concerning the antiquity and nature of the office of A CONSTABLE.

AND FIRST. As to the antiquity of THE OFFICE OF A CONSTABLE.

Sec. 33. It seems to be the (a) better opinion, that both *constables of hundreds*, which are commonly called HIGH CONSTABLES, and also *constables of tithings*, which are at this day commonly called PETIT CONSTABLES or tithingmen, and were anciently called *chief pledges*, were by the common law, and not first ordained by the *statute of Winchester*, c. 6. as it is holden by (b) some that they were; for that statute doth not say, that there shall be such officers constituted, but clearly seems to suppose that there were such before the making of it.

6. Co. 77. Lord Raym. 1193. (b) Lamb. Constable, 5. 1. Burn 384. 1. Comm. 115. 355.

(a) Salkeld 175. 381. 1. H. 7. 108. Owen 105. Finch 336. Kitchen 47, 48. 4. Inst. 265. Popham 13. C. Eliz. 375, 376. Lamb. Constable, 5, 9, 10. 4. Inst. 267.

Sec. 34. As to the nature of this office, there seems to be no doubt but that the (c) original institution of it was for the better preservation of the peace; for which purpose a constable is said to be authorised by the common law to (d) arrest felons, and also all suspicious (e) persons that go abroad in the night, and sleep by day, or resort to bawdy-houses, or keep suspicious company, and to suppress (f) affrays. And to the same end also it (g) seems, that he ought, by the ancient common law, to present at the torn or leet all those within his precinct, who have not been admitted into some tithing and sworn to the king's allegiance; and it seems that he still ought by the law in (h) use at this day,

(c) See the books cited section 33. (d) See c. 12. (e) Kitchen 48. 13. H. 7. 10. 2. Hale 88. 4. Comm. 289. (f) B. 1. c. 63. (g) Lamb. Constable, 5, 6, &c.

45. E. 3. 27. (h) Raft. Ent. 151. Crompton 212. Dalt. Sher. 388. Kitchen 47. Lord Raym. 1399. 1301.

to present all offences inquirable in the torn or leet; yet in the oath set down by *Kitchen*, he only swears to present all bloodsheds, outcries, affrays, and rescoues done within his office.

- (a) *Salk.* 380. *Sett.* 35. Also it is (a) said, that a constable was at the common law a subordinate officer to the conservators of the peace; and consequently since the office of such conservators hath been disused, and justices of peace constituted in their stead, it hath been always holden, that the constable is the proper officer to a justice of peace, and bound to execute his warrants; and therefore it hath been
- (b) 5. Mod. (b) resolved, that where a statute authorises a justice of peace to convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed or by whom it shall be executed, the constable is the proper (c) officer to serve such warrant, and indictable for disobeying it.
1330. 446. *Salkeld* 175. *Carthew* 508. *Lord Raym.* 545. (c) *Salkeld* 381. 1. *Roll.* 78. 1. *Hale* 581. 2. *Hale* 88. But see *Blatch v. Kemp* 1. II. Black. Rep. 15. notes.

- Sett.* 36. Yet inasmuch as the office of constable is wholly ministerial and no way judicial, it seems, that he may appoint a deputy to execute a (d) warrant directed to him, when, by reason of sickness, absence, or otherwise, he cannot do it himself. For the public good requires, that there should be always some officer ready at hand to execute such warrants, and the too rigorous restraint of the service of them to the proper officer, could not but sometimes cause a failure of justice; yet I do not find it settled, that a constable can make a deputy without some such special cause.
- (d) 1. *R. Abr.* 591. *Moor* 845. *Crom.* 222. 3. *Bulst.* 77. *Dart. c. 1.* 1. *Roll.* 274. 1. *Sid.* 355. 1. *Levinz.* 233. *March* 30. 2. *Keble* 3. 9. 1. *Sid.* 355. *Moor* 845. 1. *Hale* 581. 2. *Hale* 88. *Wood b. 1. c. 7.* *Strange* 943. And see the case of *Midhurst v. Waite*, that a constable may appoint a deputy to billet soldiers under the Mutiny Act; for it is a ministerial and not a judicial act, 2. *Burr.* 1259. and in the case of *Kex v. Clarke*, it seems to be admitted as a settled point that a constable may make a deputy, 1 *Term Rep.* 682.

† And by 1. Will. and Mary, c. 18. s. 7. “ If any person dissenting from the Church of England be chosen, or otherwise appointed to bear the office of high constable or petty constable, or any other parochial or ward office, who shall scruple to take upon him any of the said offices, in regard of the oaths or of any other matter or thing required by the law to be taken or done in respect of such office, he may provide a sufficient deputy to execute the same for him. And by 3. Geo. 3. c. 32. s. 7. the like privilege is extended to ROMAN CATHOLICKS, on their taking and subscribing the oath and declaration therein specified.

For

FOR the better understanding of the authority of THE SHERIFF, as judge of the torn, in relation to the appointment of constables, I shall consider the following particulars :—

FIRST, Whether the sheriff in his torn hath power to make or remove a constable.

SECONDLY, What persons are privileged from being constables.

THIRDLY, In what manner persons duly chosen constables, may be punished for refusing to be sworn.

FOURTHLY, What remedy persons having a right to this office, or to be discharged, may have to be admitted into, or restored to it, or discharged of it.

FIFTHLY, What power justices of peace have in relation to these matters.

AS TO THE FIRST PARTICULAR, *viz.* Whether the sheriff in his torn hath power to make or remove a constable.

Sec. 37. It being said in some (a) books, that both high and petit constables are to be chosen and appointed by the sheriff in his torn; and by (b) others, that they are to be chosen by the decennary, it seems difficult to determine to whom this power doth of common right belong; yet it seems clear, that whether a constable be to be chosen by the sheriff or decennary, yet he is to be sworn and placed in his office by the sheriff, as being judge of the court. Also it seems certain, that a custom for choosing a constable either way, is good; and it seems to have been the opinion of the makers of 13. and 14. Car. 2. c. 12. that the lords of the courts-leet have this power of common right; for the said statute, on the neglect of such lords to appoint a constable, gives to justices of peace the sole power of making one; from whence it seems probable, that the makers of that statute thought that the like power did originally belong of common right to such lords, and consequently to the sheriff in his torn, where there is no court-leet: But (c) it hath been said, that a custom in a town that the inhabitants shall serve the office of constable by turns, according to the situation of their several houses, is not good; for that by such a course it may come to a woman's turn to be constable, as inhabitant of one of those houses; yet we find such customs allowed to be good in later books; and it seems, that the consequence of the reasoning above-mentioned may well be denied,

(a) Dalt. Sher. 400.
1. Roll. 34.
(b) 2. Jones 212.
Lamb. Constable, 8.
Salkeld 175.
Holt 152.
Lord Raym. 70. 138.
Cowp. 13. 16.
11. Modern 125.
Douglas 537.

(c) C. Car. 389.
2. Kcb. 309.
578.
1. Lev. 266.
1. Sid. 355.
Strange 943.

denied, since such woman in such case may procure another to serve for her.

Sett. 38. However, it seems clear, that the sheriff or steward having power to place a (a) constable in his office, have by consequence a power of removing him.

As to THE SECOND PARTICULAR, *viz.* What persons are privileged from being constables.

(b) *Noy* 112, *Sett.* 39. It (b) seems certain, that if a SWORN ATTORNEY, or other officer of any of the courts of *Westminster-Hall* be chosen into this office, he may have a writ of privilege for his discharge; for that all such officers, being bound to give their personal attendance to such courts, shall be privileged from all such inferior offices, which it is apparent that for the most part they cannot personally execute. And it hath been resolved, that such officers shall have this privilege not only where there is no special custom concerning the election of constables, but (c) also where they are chosen by a particular custom, in respect of their estates or otherwise; for that no such custom shall be intended to be more ancient than the usages of those courts, and therefore shall give way to them: And upon the like reasons I find it (d) taken for granted, that practising barristers at law, and the servants of members of parliament, have the same privilege, but I know not of any resolution to this purpose.

(e) *1. Jon.* 462. *Sett.* 40. Also it hath been resolved, that AN (e) ALDERMAN of *London* is not compellable to be a constable, for that as an alderman he is bound to be present in the city for the good government of it.

(f) See 3, *Sett.* 41. But (f) it hath been holden, that A CAPTAIN of the king's guards, being presented to serve as constable, in pursuance of a custom in respect of his lands in a town, cannot claim this privilege; for that notwithstanding he be bound by his office to personal attendance on the king's person, yet such office being of late institution, shall not prevail against an ancient custom.

† But by 26. Geo. 3. c. 107. s. 130. "no serjeant or private man serving in the militia shall, during the time of such service, be appointed to serve as a peace officer, or a parish officer, unless he shall consent thereto."

(g) *1. Keb.* 578. Also it (g) seems, that A PRACTISING PHYSICIAN being chosen constable, in pursuance of such custom, has no remedy for his discharge; for that there are no precedents of this kind,

kind, and his calling is private; yet if such an officer, or a (a) gentleman of quality who hath no such office, or a practising physician, be chosen constable of a town, which has sufficient persons besides to execute this office, and no special custom concerning it, perhaps he may be relieved by the king's bench. But it (b) seems, that even a custom cannot exempt fitting persons from serving the office of constable, where there are not sufficient besides them to execute it. Yet these points seem not to be settled, as appears by the various opinions in the books concerning this matter, which are very differently reported.

(a) 1. Keble 439.
 Con. 2. Keble 578.
 (b) Sid. 272.
 Sec 1. Keble 933.
 2. Shower 75.
 A tenant in ancient demesne is liable to the office, Vent. 244.

Sett. 42. It is alledged in the petition of the *London surgeons*, whereon the statute of 5. Hen. 8. c. 6. is made, "That the wardens and fellowship of the craft and mystery of surgeons infranchised in the city of *London*, not passing in number twelve persons, for the continual service and attendance that they at all hours and times give to the king's people, have been exempted and discharged from all offices and business wherein they should use or bear any manner of armour or weapon, &c." And thereupon it is enacted and established, "That from thenceforth the said wardens and fellowship be discharged, and not chargeable of constableness, watch, and all manner of office bearing any armour, &c. and also that the said act extend to all barber-surgeons, admitted and approved to exercise the said mystery of surgeons, according to the form of the statute made in that behalf, so that they exceed not, nor be at any time above the number of twelve persons."

Sett. 43. And it seems, that by the equity of this statute, and the ancient custom of the realm, all *SURGEONS* have been allowed the like privilege.

2. Keble 578.
 1. Burn 387.

† And by 18. Geo. 2. c. 15. s. 10. "for making *THE SURGEONS of London* and *THE BARBERS of London* two separate and distinct corporations," it is enacted, "That all freemen of the corporation of surgeons (c) for so long time as they shall use and exercise the art and science of surgery, and no longer, shall be exempted from the several offices of constable, scavenger, overseer, and all other parish, leet, and ward offices, and from serving upon juries."

(c) On an indictment against a surgeon for refusing the office of constable, it may be moved to the

attorney-general that a *noli prosequi* be granted, unless cause be shewn by the opposite party against it. *Comyns* 312.

Vide sup. f.
41.

Stat. 44. Also by 32. Hen. 8. c. 40. "The president of
" the commonalty and fellowship of the science and faculty
" of physic in *London*, and the commons and fellows of the
" same, shall not be chosen constables in the city of *Lon-*
" *don*, or suburbs of the same, &c." Yet it seems to have
been holden, that the equity of this act doth not extend to
other physicians not mentioned in it; perhaps for this reason,
because physicians have no such special custom for their
discharge as surgeons are said to have.

Stat. 45. By 6. Will. 3. c. 4, which hath been continued
by subsequent statutes, "All persons using the art of
" AN APOTHECARY, who have been brought up and served
" as apprentices in the said art for seven years, according to
" the statute of 5. Eliz. shall be freed and exempted from
" the office of constable, in the counties and places where
" they live, for so long as they use and exercise the said
" art."

† By 1. Will. and Mary, c. 18. f. 11. "Every teacher or
" preacher in holy orders, or pretended holy orders, that is
" a minister, teacher, or preacher of a congregation, that
" shall take the oaths, make and subscribe the declaration,
" and also subscribe such of the Articles of the Church of
" *England* as the act requires, shall be thenceforth exempted
" from serving upon any jury, or from being chosen or ap-
" pointed to bear any parochial office, ward office, or other
" office in any hundred of any shire or place."

† By 31. Geo. 3. c. 32. f. 7. the like privileges are given
to Roman Catholics, on their taking and subscribing the
oath and declaration therein specified.

N. B. This
certificate
may be once
assigned over,
provided it
has never been
used.—But it
will not ex-
empt from an
office, the
functions of
which are to
be exercised
out of the pa-
rish. *Ld. Mansfield. Burrow 1182.*

† By 10. and 11. Will. 3. c. 23. "All and every person or
" persons who shall apprehend and take any person guilty
" of burglary, or of privately stealing goods to the value of
" five shillings in any shop, warehouse, coach-house, or
" stable, or who shall assist, hire, or command any person
" or persons to commit such offence, and prosecute him to
" conviction, shall have a certificate in the manner directed
" by the act, by virtue whereof he shall and may be dis-
" charged of and from all and all manner of parish and
" ward offices within the parish or ward wherein such felony
" shall be committed."

† Also by 31. Geo. 2. c. 17. f. 13. "No person within
" the city or liberty of *Westminster* shall be liable or com-
" pelled

“pelled to serve as a constable, or to find a person to serve in his stead, who is of the age of *sixty-three* years or upwards.”

† It hath been determined that a naturalized foreigner, excluded by the act of parliament from “taking any civil office of trust,” is thereby rendered ineligible to the office of constable. 5. Bur. 2790.

† So also a college barber of *Oxford*, although he resides in the city of the university and out of the precincts of the college, seems exempted from this office. Doug. 531.

† But a younger brother of the *Trinity House* is not exempted from the office by the charters of the fraternity; the king however may exempt any person or whole bodies corporate from serving the office of constable, subject to the restriction, that the exemption be not extended so far as to prevent the existence of the office in any particular place. 1. Term Rep. 679.

† A person who is *resiant* within a private seat within a hundred, is not therefore exempt from serving the office of constable within the hundred. Cowp. 13.

AS TO THE THIRD PARTICULAR, *viz.* In what manner persons duly chosen constables may be punished for refusing to be sworn.

Seft. 46. It seems that no person can lawfully be committed for such refusal without more; but it is said, that if the party be present in the court he may be fined, and that if he be absent, and have a certain time and place appointed him for the taking of the oath before a justice of peace, and have also express notice of such appointment, and be presented at the next court, for having refused to take it accordingly, he may be amerced. Also it seems, that in either case he may be indicted either at the sessions of the peace, or before justices of *oyer and terminer*. And it is advisable in all pleadings in any action concerning such a fine or amercement, and in all indictments for such refusal, especially and expressly to set forth the manner of every such election, appointment, notice, and refusal, and (a) before whom the court was holden. And it hath been adjudged, that it is insufficient to say in general, that the party was (b) *debito modo electus*, or *legitimè electus*, or that he had (c) notice thereof, without setting forth the special circumstances of such notice, &c. Also it is (d) said to have been ad-

C. Car. 567.
Co. Ent. 572.
5. Mod. 130.
Salk. 175.
8. Coke 38.
Ld. Raym. 69.
138.

(a) 1. Mod. 24.
(b) 5. Mod. 96. 129.
(c) Aleyn 78.
5. Mod. 96.
129, 130, 131.
1. Keb. 418.

Vide sup. f. 66. (d) 1. Keb. 416. 6. Co. 77. Vide also 2. Strange, 920. Fitzg. 192. Barnard, K. B. 413. 11. Mod. 215. 12. Mod. 280. Self. case, 480. Saund. 290.

judged,

judged, that an indictment for not finding a sufficient person to serve the office of constable, without shewing that the party refused to serve it himself, is sufficient, and it is said not to be sufficient to shew, that a man was presented and returned to be a chief pledge, without shewing that there were other inferior pledges.

As to THE FOURTH PARTICULAR, viz. What remedy persons having a right to be constables, or to be discharged, may have to be admitted into or restored to their office or discharged of it.

Sec. 47. It seems clear at this day, that the court of king's bench, having the supreme control of all inferior jurisdictions, may upon the complaint of any person apprehending himself to be unjustly aggrieved in any such respect, award a writ to the judge of the court, thereby commanding him to swear, restore, or discharge the party as the case shall be; whereupon, if such judge do not obey such writ, nor an *alias* and *pluries* to the same purpose, or return a sufficient cause to the court to justify his not obeying it, the court will at last award a *peremptory mandamus*.

1. R. Ab. 535.
541.
2. Roll. 82.
Con. 1. Bulst
174

Sec. 48. Also it hath been holden, that a person duly chosen constable at a court leet, and refused to be sworn by the steward, may be relieved by the sessions of the peace. But this point shall be more fully considered in the next section.

2. Jones 212.

As to THE FIFTH PARTICULAR, viz. What power justices of peace have in relation to these matters.

Sec. 49. It is observable, that the constable being a principal peace officer, and it being necessary for the preservation of the peace, that every vill should be furnished with one, the justices of peace have, ever since the institution of their office, taken upon them as conservators of the peace, not only to swear constables which have been chosen at a torn or leet, but also to nominate and swear those who have not been chosen at any such court, on the neglect of the sheriffs or lords to hold their courts, or to take care that such officers are appointed in them. Also it seems, that such justices have always used for good cause to displace such officers which have been so chosen and sworn by them, and this power of justices of peace having been confirmed by the uninterrupted usage of many ages, shall not now be disputed, but shall be presumed to have been grounded on sufficient authority. And some have carried this point so far, as to allow the justices at their sessions to swear one who

Salk. 175, 176.
1. Modern 13.
2. Jones 212.
1. Bulst. 174.
Alcyn 78.
Dalt. f. 366,
367.
12. Mod. 180.
Strange 798.
1050.
2. Hale 88.
Con. 1. Bulst.
174.

was chosen at the leet, and unduly rejected by the steward, who had sworn another in his place (4).

(4) A constable was chosen at a court leet, and afterwards sworn in before a single justice of the peace; upon motion for an information, the Court held it to be a good swearing. *Strange* 1149. 2. *Hale* 88. Justices of the peace may appoint a constable even in a privileged place, where there has been none for fifty years before, and proceed against him for not taking the oath. In the hamlets about THE TOWER they chose five where there was formerly but one, and it was held they might do so. For though originally constables were chosen in leets, yet being officers whose duty it is to keep the peace, the justices may chuse them *in cases of necessity*. Case of the constable of Holmby, 1. *Bac. Ab.* 439.

Sec. 50. However it is certain, that justices of peace had power to nominate and swear constables on the default of the torn or leet, before the statute of 13. & 14. Car. 2. c. 12. s. 15. and therefore, they have such authority in some cases not mentioned in that statute, which reciting, "That the laws and statutes for apprehending rogues and vagabonds had not been duly executed, sometimes for want of officers, by reason lords of manors do not keep court-leets every year for the making of them," doth enact, "That in case any constable, headborough, or tithingman, shall die or go out of the parish, any two justices of peace may make and swear a new constable, headborough, or tithingman until the said lord shall hold a court, or until next quarter sessions, who shall approve of the said officers so made and sworn as aforesaid, or appoint others, as they shall think fit: and if any officer shall continue above a year in his or their office, that then in such case the justices of peace in their quarter sessions may discharge such officers, and may put another fit person in his or their place until the lord of the said manor shall hold a court as aforesaid (5)."

Strange 446. and the books cited in the precedent section. For the cases in which a constable, &c. is exempted from actions, *Vide* 1. *Jac.* 1. c. 5. 21. *Jac.* 1. c. 12. 24. *Geo.* 2. c. 44. Ante p. 61, 62. Concerning the expences of his office, *Vide* 27. *Geo.* 2. c. 20. For his reimbursement, *Vide* 18. *Geo.* 3. c. 19. And for his account and removal,

Vide 12. *Geo.* 2. c. 29. s. 8.

(5) But justices even in sessions are not empowered, by the force of this statute, to discharge constables chosen and sworn in at the court-leet. *Strange* 798. and the statute must be strictly pursued by the sessions, and therefore an appointment in the disjunctive "for a year, or until others be chosen," was quashed. *Strange* 1050. So also the court will grant a *quo warranto* against a constable elected at a vestry and sworn in at the sessions under this statute; for *prima facie* the right of appointing is in the leet, and the sessions have no power if there has been no default. *Strange* 1213. *Fitzgibbon* 192. *Douglas* 536.

CHAPTER THE TENTH.

CONTINUED.

OF

THE SHERIFF'S TORN.

HAVING considered the power of the sheriff in his torn, as to the appointment of constables, I shall proceed to THE FIFTH GENERAL POINT of this chapter, *viz.* What kind of offences are inquirable in the sheriff's torn. I shall premise the following observations.

4. Inst. 261. First, That it is no certain rule, that such offences as are
Crom. 213. omitted in 18. Edw. 2. concerning the *view of frank-pledge* are not within the jurisdiction of the torn or leet.

F. Torn, 5. Secondly, That offences made treason or felony, or in
Infra. f. 52. any other manner having a restraint by statute superadded to that of the common law, are not inquirable here in respect of any such statute, but only as offences, at the common law; for that the jurisdiction of these courts is wholly confined to offences at common law.

Keilwood 66. Thirdly, that no offence whatsoever is cognisable in any such court, unless it arose since the holding of the last court.

OFFENCES inquirable in this court are either, Capital; or Not capital. The capital offences are either Treasons or Felonies.

AND FIRST as to *treasons*.

(a) Crom. 212. *Sett.* 51. It is said in (a) some books, that the sheriff in his
Dalc. Sher. torn may inquire of them all in general, and in (b) others,
292. that he may inquire of all which are not against the king's
7. H. 6. 12. person; but I can find no reason given for this distinction;
10. H. 6. 7. and since it is a general rule, that offences are inquirable in
Qu. Bro. Leet this court, in respect of their being of a publick nature, on
26. which account the lowest offences against the king, as (c)
(b) 9. H. 6. 44. *mortmains* and *purprestures*, and such like, are inquirable
(c) Inf. f. 58. in it, it seems strange, that the highest should be exempted.
(d) Kitchen, 8, 9. 22. However, it is (d) clear, that the sheriff has no power to
Summary 173. inquire of any offence made treason by statute, as of a trea-
6. H. 7. 4. 5. son, but only as it was an offence at common law.

SECONDLY,

SECONDLY, As to felonies.

Sett. 52. It is also generally said in (a) some books, that the sheriff in his torn may inquire of all kinds of felonies, and in (b) others that he may inquire of all except of the death of a man, or rape. Of the first of which it is said, that he cannot enquire, because it is not a common nuisance, but only a wrong to a single person. But if this reasoning be the only foundation for this opinion, it seems difficult to maintain it; for if an assault and battery of a single person being accompanied with bloodshed or robbery, be inquirable in this court, in respect of the enormity of the offence, and the danger to the publick from suffering such offenders to go unrestrained, it seems strange, if such an assault proceed to murder, that it should not be inquirable in it also. But it is (c) said that the sheriff cannot inquire of a rape as of a felony, because it is made a felony by the *statute of Westminster the second*, c. 34. by which it is enacted, "That he who ravishes a woman, shall have judgment of life and member." But if this statute had only repealed the 12th of Westminster 1. by which this offence, which was a felony at common law, was made a trespass only, it seems that it would have restored the jurisdiction of the sheriff's torn over it as a felony, because then it would have been a felony by the common law again; but now it being a felony only by the statute, it is inquirable as a trespass only in this court.

(a) 10. H. 6. 7.
Kitchen 9. 10.
Crompton
212.
Dalt. Sher.
392.
(b) 9. H. 6. 44.
22. E. 4. 22.
7. H. 6. 12.
F. Torn, 5.
40. Affize 30.
B. Lect. 18. 26.
Finch 241.
Kitchen 22.

(c) Kitchen
22. 18. E. 2.
View of
Frankpledge
2. Inst. 181.
22. E. 4. 22.
6. H. 7. 4. 5.
F. Torn 5.
F. Lect. 3.
1. Hale 632.
2. Hale 69.
71.

OFFENCES not capital inquirable in the sheriff's torn; are either, such as amount to an actual trespass; or such as do not amount to an actual trespass.

And first, as to such offences amounting to an actual trespass.

Sett. 53. It is agreed, (d) that an assault and battery is inquirable here if there be any bloodshed in it, but otherwise not; because in such case it is not looked on as a common grievance, but as an injury to a particular person.

of Frankpledge.

(d) 3. E. 4. 5.
Dyer 223.
1. R. 3. 1.
4. H. 6. 18.
18. E. 2. View
of Frankpledge.
Kitch. 37, 38.

Sett. 54. SECONDLY, that all (e) affrays are also inquirable here, for that they are *in terrorem populi*.

(e) 4. H. 6. 10.
1. R. 3. 1.
B. Lect. 15.

Sett. 55. THIRDLY, that the common (f) breaking of hedges, walls, or dykes, may also be inquired of in this court, but not the breaking of any particular hedge, for that it is no common grievance.

(f) Kitch. 11.
B. Lect. 26.
22. E. 4. 23.
Finch 241.

(a) Dalt.
Sher. 394.
Kitch. 11. 37.
Con. 4. Leon.
12.

SecT. 56. FOURTHLY, Also it is commonly said, that all (a) *pound breaches* may be inquired of in this court, as being common grievances, in direct contempt of the authority of the law, by which *pounds* are provided for the legal detainment of distresses till they shall be delivered by due course of law.

OFFENCES under the degree of capital, not amounting to an actual trespass, and inquirable in this court, either immediately concern the king's interest, or do not.

FIRST, As to those which immediately concern the king's interest.

(b) Dalt.
Sher. 393.
(c) Kitch. 23.
38, 39.
(d) Kitch. 40.
18. Ed. 2.
View of
Frankpledge.
(e) Kitchen
12. 13. 23, 40.
Dalt. Sher.
393.
Crom. 213.
(f) 44. E. 3.
19. (g) 1. Saund. 135. Raym. 160. 12. H. 4. 8.

SecT. 57. It seems to be agreed, that all (b) *purprestures* or incroachments upon the king, and (c) alienations in mortmain, and (d) seizures of treasure-trove, or of (e) waifs or (e) estrays, or goods (e) wrecked, belonging to the king, may be inquired of in this court. But it seems (f) questionable, whether a prescription in a court-leet to inquire of the seizure of such things belonging to the lord of it, being a subject, be good or not, since it is against the general (g) rule of the law, for the court leet to take cognisance of trespasses done to the private damage of the lord, because that would make him his own judge.

SECONDLY, As to offences of this kind, which do not immediately concern the king's interest.

(b) 1. R. 3. 1.
4. H. 6. 10.
22. E. 4. 22,
23.
1. R. Ab. 541.
542, 543.
(i) Kitch. 11.
(k) 1. R. 3. 1.
B. Lect. 1.
4. Inf. 261.
Kitch. 11. 23.
3. Burr. 1861.
(l) 2. Inf. 72.
4. E. 4. 24.
4. Inf. 262.
R. Abr. 543.
But breaking
the assize of
bread as esta-
blished by the statute 3. Geo. 3. c. 11. is not within the jurisdiction of this court.
(m) Crom. 212. (n) 18. E. 2. View of Frankpledge. Con. Kitch. 11. Dalt. Sher. 395. (o) Kitchen, 11. Hobart, 246. (p) Crom. 212. Dalt. Sher. 394. (q) 18. E. 8. View of Frankpledge. Kitchen 11.

SecT. 58. It seems to be a general (b) rule, that all common nuisances are indictable in this court; as all annoyances to common bridges or highways; (i) bawdy houses, &c.; and also all other such like offences, as (k) selling corrupt victuals, or exposing them to sale; (l) breaking the assize of beer and ale; neglecting to hold a (m) fair or market in pursuance of a grant or prescription. Also it seems that the keeping of (n) false weights or measures is indictable in this court, whether it appear that they were actually made use of or not: Also it is said, that all common disturbers of the peace may be here indicted, as (o) barrators, common (o) scolds, (o) eves-droppers, and also all common oppressors, as usurers, (p) &c. and also all (q) dangerous and suspicious persons, as vagabonds; or those who go abroad in the night, and sleep in the day, or those who inordinately haunt ta-

verns, having no visible means to live by, &c. And also all (n) suitors to the court who shall make default, &c. And (b) also all those who shall levy a HUE AND CRY without cause, or shall neglect to levy one where they ought, or to pursue one rightly levied.

(a) Kitchen,
10.
(b) Dalt.
Sher. 394.
18. E. 2.

View of Frankpledge.

Sett. 59. Also (c) it is said, that every vill within the precinct of a torn is indictable in it for not having a pair of stocks, and shall forfeit five pounds.

(c) Kitchen
13.
See the next
chaptes.

Sett. 60. Also by (d) statute, many other offences are inquirable in this court, which it would be too long to enumerate in this place.

(d) Kitchen
12.
2. Danv. Abr.
291.

Sett. 61. But it hath been (e) resolved, that a man cannot be amerced in a court-leet for surcharging a common, because this only concerns the private interest of the inhabitants.

(e) 1. R.
Abr. 51.
2. R. Abr. 83.

Sett. 62. Yet it hath been (f) holden, that if there be a by-law made in a court-leet, in pursuance of a custom to make by-laws, that no one shall receive a poor man to be his tenant, who shall be chargeable to the town, under a certain penalty, and afterwards an inhabitant offend against such by-law, he may be presented at the court-leet and compelled to pay such penalty. But if such by-laws be valid, it seems clear, that they depend entirely on the custom, and are not binding of common right; for that the court-leet, as such, hath nothing to do with such matters of a private nature: and how far any such court may receive from a special custom, a new collateral power of a different nature from what naturally belongs to it, may deserve to be considered. But it (g) seems that of common right any court-leet, with the assent of the tenants, may make by-laws under certain penalties, in relation to matters properly within the cognisance of such court, as the reparation of the highways, &c. Also there (h) seems to be no doubt, but that, by custom, a court-baron may make by-laws, for the well regulating of commons and such like private matters; and therefore where a court-leet and court-baron are holden together at the same place, as they usually are, it seems that what is transacted therein in relation to publick matters, shall be applied to the (i) jurisdiction of the court-leet, and what is done in relation to private matters, shall be intended to be done by the court-baron.

(f) 1. R.
Abr. 542.
Lane 55, 56.

(g) 11. H. 7. 14.
21. H. 7. 40.
5. Co. 63.
Hobart 212.
Kitchen 45.
(h) 1. Danv.
735. 737.
Kitchen 78.

(i) Chap. 11.
sect. 6.

As to THE SIXTH GENERAL POINT of this chapter, *viz.* Within what place offences indictable in the sheriff's torn must arise.

Sett. 63. It seemeth that it is not material, whether such (a) offences did arise within the hundred in which the torn is holden or not; for though the sheriff ought to hold his torn in every particular hundred, yet it seems, that in each of them he holds it for the whole county; and it is certain, that he hath a general jurisdiction throughout the whole; yet it seems, that the jurors shall not be charged on their (b) oaths to present any offences but those arising within their particular hundreds. Also it is provided by the *statute of Marlebridge*, c. 10. that those who have tenements in different (c) hundreds, shall not be compelled to come to any torn, but only in the bailiwick wherein they shall be conversant: Also it (d) seems clear, that no offence, arising within the precincts of a leet, is inquirable in the torn, unless there hath been a neglect to present it in the leet; but after such a neglect it seems the better (e) opinion, that it is inquirable in the torn, lest otherwise there should be a failure of justice. Yet it seems certain, that in pleading you (f) cannot justify the proceedings of the sheriff's torn against any offence arising within a leet, without expressly alledging that the leet had neglected to inquire of it, for that such a neglect is not to be presumed, where it doth not appear.

(a) Dalt. Sher. 285.
Finch 241, 242.
Con. C. Jac. 551.
(b) Crom. 212.
Dalt. Sher. 388.
(c) 2. Inst. 120. 122.
(d) 1. R. Abr. 543.
Crom. 212.
Co. Lit. 168.
B. Prefent. 1.
Dalt. Sher. 395. 396.
3. Keb. 220.
(e) 10. H. 4. 4.
12. H. 7. 18.
Moor 607.
Finch 246.
C. Jac. 584. 551. Con. 4. Inst. 261. (f) C. Jac. 551.

As to THE SEVENTH GENERAL POINT of this chapter, *viz.* By what jurors, and in what manner, indictments in the sheriff's torn ought to be found.

Sett. 64. It is enacted by the *statute* (7) of *Westminster the second*, c. 13. "That the sheriff shall take no inquest either *ex officio*, or by virtue of the king's writ, but by twelve lawful men at the least, who shall put their seals to such inquisitions;" and the same is also provided as to bailiffs of franchises.

2. Inst. 387.
2. Hale 70.
122.
(7) This act respects only such inquisitions as are a foundation for imprisonment, and not inquisitions for offences where the party cannot be apprehended. 3. Burr. 1861.

Sett. 65. In the construction of this statute it hath been holden, that if there be more than twelve jurors, and all of Sheriff 389. agree to the inquisition, all must set their seals to it; but that (8) But see it is sufficient if twelve of them only agree, for those twelve to set their seals. (8) Colebroke v. Elliot, where it is determined that it is not necessary that inquisitions should be sealed, except only such as are a foundation for imprisonment. 3. Burr. 1861.

Sett. 66.

Stat. 66. And it is farther enacted by 1. Rich. 3. c. 4. " That no officer return or impanel any person to be taken
" or put in any inquiry in any sheriff's torn, but such as
" be of good name and fame, and having freehold to the
" yearly value of twenty shillings, or copyhold to the yearly
" value of twenty-six shillings and eightpence, on pain of
" forty shillings, &c. And that every such indictment
" before any sheriff in his torn otherwise taken, shall be
" void."

Stat. 67. AND NOTE, that courts-leet seem to be within the letter of the said statute of *Westminster the second*, and are said by some to be within the equity of the said statute of 1. Rich. 3. : but this seems questionable ; for it is said, by some books, that any person happening to be present at a court-leet, or to be riding by the place where it is holden, may for the want of jurors be compelled by the steward to be sworn, whether he be resident within the precincts of the leet or not ; by which it seems to be implied, that any person whatsoever is capable of being put upon the jury in a court-leet.

Stat. 68. And to prevent the altering or imbezzling of any such indictment, it is enacted by (9) 1. Edw. 3. ft. 2. c. 17. " that the sheriffs and bailiffs of franchises, and all
" other that do take indictments in their torns or else-
" where, where indictments ought to be made, shall take
" such indictment by roll indented, whereof the one part
" shall remain with the indictors, and the other part with
" him that taketh the inquest ; so that the indictments
" shall not be imbezzled, as they have been in times past ;
" and so that one of the inquests may shew the one part
" of the indenture to the justices, when they come to
" make deliverance."

to be indented. 3.

Stat. 69. And there is no doubt, but that this statute extends as well to courts-leet as the sheriff's torn.

Stat. 70. Also there are many particular customs and usages in relation to the taking of indictments in these courts ; but it seems to have been anciently the most general course to impanel not only A GRAND JURY, but also a jury of twelve men, which was commonly called THE PETIT JURY ; and that all offences were first presented by the headboroughs, and the presentments affirmed by the petit jury, before they were brought to the grand jury : however, it seems that no exception can be taken to any such indictment, in respect of the non-observance of any

2. Inst. 388.
S. P. C. 85.

7. H. 6. 13.
12. H. 7. 18.
B. Leet 14.
3. H. 7. 4

2. Inst. 388.
S. P. C. 85.
12. Co. 43.
(9) This act
only relates to
such *indict-
ments* as were
to be deliver-
ed over to the
justices ; *pre-
sentments* are
not within the
meaning of it,
and therefore
not necessary
Burrow 1861.

2. Hale 71.

Keilw. 141.
148.
Dalt. Sher.
388, 389.
Crom. 212,
213.
Keilwood 66.
9. H. 6. 44.

such custom or usage, for that no averment lies against the acts of a court of record, and every judge of such court shall be presumed to act according to the rules of it.

2. Hale 69.
C. Eliz. 371.

Sett. 71. What is above said concerning indictments taken before the sheriff in his torn, is to be intended of such only as are taken before him *ex officio*, for that he is restrained to take any such indictment, by virtue of any writ or commission by 28. Edw. 3. c. 9. which reciting that the people had suffered many mischiefs, for that sheriffs of divers counties, by virtue of commissions and general writs granted to them at their own suit, for their singular profit to gain of the people, had made and taken divers inquests, to cause to indict the people at their will, and had taken fine and ransom of them to their own use, and had delivered them, whereas such persons indicted were not brought before the king's justices to have deliverance, doth thereupon enact, for to eschew all such mischief, "that all such commissions and writs before made, be utterly repealed, and that from thenceforth no such commissions nor writs shall be granted."

F. N. B. 92.
144. 250.
C. Eliz. 371.
Salkeld 190.
2. Inst. 388.

Sett. 72. Yet it seemeth not to be clearly settled, whether by virtue of this statute, all such writs and commissions, and the proceedings thereon, be made wholly void or not.

As to THE EIGHTH GENERAL POINT of this chapter, viz. In what manner indictments in the sheriff's torn are to be proceeded upon.

Summary 173.
S. P. C. 77.
84.
Dalt. Sher.
388, 389.
3. Mod. 238.
Book the first,
ch. 29. sect.
20. 24.

Sett. 73. It is recited by 1. Edw. 4. c. 2. "That many of the king's people by inordinate and infinite indictments and presentments of felonies and other offences, taken before sheriffs at their torns, or law-days (which were oftentimes affirmed by jurors having no conscience, nor any freehold, and often by the sheriff's menial servants), had been arreited and imprisoned, and constrained to make grievous fines and ransoms, after which they had been enlarged out of prison, and the said indictments and presentments imbezelled and withdrawn." And thereupon it is enacted, "That all indictments and presentments before any of the king's sheriffs in his counties, except in London, their under-sheriffs, clerks, bailiffs, or ministers at their torns or law-days, they, nor any of them, shall have power to attach, arrest, or put in prison, or to levy or take any fine or amerciamment of any person so indicted or presented, by reason of any such indictment or presentment, but that the said sheriffs and under-sheriffs, clerks, or bailiffs, and their

“ their ministers, shall deliver all such indictments and pre-
 “ sentments to the justices of peace at their next county ses-
 “ sions, on pain of forty pounds.”

See 4. Term
 Rep. 505.

“ And by 1. Edw. 4. c. 2. it is further enacted, that
 “ the said justices of peace shall have power to award
 “ process upon all such indictments and presentments as
 “ the law doth require, and in like form as if the said
 “ indictments and presentments were taken before the said
 “ justices of peace; and also to arraign and deliver all such
 “ persons so indicted and presented before the said sheriffs,
 “ &c. And such persons which shall be indicted or pre-
 “ sented of trespass, shall make such a fine as shall seem
 “ lawful by their discretions. And the estreats of the said
 “ fines and amerciaments shall be enrolled, and by indenture
 “ be delivered to the said sheriffs, under-sheriffs, their clerks,
 “ bailiffs, or ministers, or some of them, to the use and pro-
 “ fit of him that was sheriff at the time of such indictments
 “ or presentments taken.

“ And by 1. Edw. 4. c. 2. if any of the said sheriffs, their
 “ under-sheriffs, clerks, bailiffs, or their ministers, do arrest,
 “ attach, or put in prison, or cause any fine or ransom to be
 “ taken, or levy any amerciament, of any person or persons so
 “ indicted or presented, by reason or colour of any such
 “ indictment or presentment taken before them, at their
 “ torns or law-days above rehearsed, before that they
 “ have process from the said justice of peace, or estreats
 “ delivered out, of the said indictments or presentments
 “ so brought, delivered, and presented to them, that then
 “ the sheriffs which so do, shall forfeit an hundred
 “ pounds.”

See. 74. It is observable, that by the words of this
 statute, justices of peace may award process on any such
 indictments, in like manner as if they had been taken be-
 fore themselves; and yet it is clear, that if the sheriff's torn
 had no authority to take the indictment removed before such
 justices, they have no power to proceed upon it, as they
 might have done, if it had been taken before themselves;
 for the statute, in giving them such power to proceed upon
 indictments in the sheriff's torn, must be intended to mean
 such only as were there lawfully taken, not those which were
 void *ab initio*, as being taken *coram non judice*; nor is there
 the least intimation in the statute of an intent to enlarge the
 sheriff's power in taking indictments, but the whole purport
 of it is to restrain him from proceeding on them. And to
 this purpose it hath been so largely construed, that not only
 the judge of the court is punishable for awarding such pro-
 cess, but also the officer for obeying it.—† It has also been

2. Hale 70.
 71. 142.
 S. P. C. 87.
 4. E. 4. 31.
 F. Torn, 3.

2. Jones 306.
 C. Car. 275.

(10) Bengough
v. Rossiter, 4.
Term Rep.
505.

held, that this statute takes away the power which sheriffs had by the common law, and the statute 23. Hen. 6. c. 9. of balling persons indicted before him in his torn, (10) and obliges him to return such indictments to the justices at the next sessions.

As to THE NINTH GENERAL POINT of this chapter, viz. In what manner indictments in the sheriff's torn are to be traversed and determined.

(a) Finch 386.
Keilw. 52. 66.
3. Modern 138.
Dyer 13.
(b) Keilw. 141.
45. E. 3. 26,
27.

(c) F. Bar. 271.
Keilw. 66.
41. Ed. 3. 28.

(d) 5. H. 7. 4.
B. Trav. 183.
Keilw. 52. 66,
Dyer 13.

(e) Keil. 66.
41. E. 3. 27.

Sec. 75. It seems to be (a) agreed, that a presentment by (b) twelve or more in a torn or leet, of any offence within the jurisdiction of the court, being neither capital nor concerning any freehold, subjects the party to a fine or amerciamment without any farther proceeding, and binds him for ever after the day on which it is found, and admits of no traverse to the truth of it; but (c) some say, that the party may have a writ of false presentment against the jurors the same day on which the indictment is found; yet it seems agreed, that no instance can be shewn of any such writ being actually brought. But if the presentment concern the party's life or (d) freehold, as if it charge him with not repairing such a highway, which he is charged to be bound to repair by the tenure of his land; it seems clear, that he may remove it into the king's bench and traverse it; but not if it barely charge his person, as for digging a ditch in the highway, or not cutting the branches of his trees hanging over it, &c. Also it (e) seems, that a man may in like manner traverse an indictment of an offence wholly out of the jurisdiction of a court-leet; as of an affray or nuisance done out of the precinct of it, or of the non-appearance of a person at a leet, who lives out of the precinct of it. But if the affray or nuisance were within the precinct of the leet, it seems, that no one can traverse it in respect of his own not living in it; and that a person who lives within the precinct of a leet shall have no traverse to a presentment for not appearing at it. (11).

(11) A presentment cannot be traversed at the leet; but the proper method is to apply to the court of King's Bench for a *certiorari* to remove the *presentment*, and when removed it may be traversed, *Rex v. Roupel*, Cowp. 458. For otherwise the defendant may be condemned and confined without the opportunity of being heard, or of taking exception in point of form to the presentment itself, 11. Co. 44. But the Court will not grant a *certiorari* for this purpose, when the amerciamment has been estreated and the fine paid, *Rex v. Hgaton* 2. Term Rep. 184.

Sec. 76. But it seems certain, that at this day neither the torn nor the leet have any power to try any traverse whatsoever, as hath been more fully shewn, section the thirteenth.

Sec.

Señ. 77. But it is certain, that the justices of peace may by force of the abovementioned statute of 1. Edw. 4. try a man indicted of felony before the sheriff in his torn.

Señ. 78. Also it seems, that they may try a person upon any other indictment in the torn, which is traversable at common law; but that they have no power to take any traverse of any other indictment in the torn, for that the words of the statute are only that they may award process on any such indictments as if they had been taken before themselves, and also arraign and deliver the persons indicted, which must be intended of those indicted of felony, who only are said to be arraigned, and that persons indicted of trespass shall make fines, &c. by their discretion, without saying, that they shall be tried; by which it seems to be implied, that persons so indicted shall be fined, as they usually were before in the torn, and still are in the leet, and that in some cases without any farther trial, as is more fully shewn in the precedent section.

For the sheriff's oath of office, vide 3. Geo. 1. c. 15. for the manner of passing his accounts, 3. Geo. 2. c. 15, 16. and for further particulars, vide *Impey's Office of Sheriff*.

CHAPTER THE ELEVENTH.

OF

THE COURT-LEET.

4. Comm. 270.
Finch 246.(a) Sect. 45.
&c.(b) Sect. 10.
&c.(c) Sect. 13.
&c.(d) Sect. 17.
&c.(e) Sect. 33.
&c.(f) Sect. 51.
&c.(g) Sect. 64.
&c.(h) Sect. 65.
&c.(i) Sect. 74.
&c.

A COURT-LEET is a court of record, having the same jurisdiction within some particular precinct, which the sheriff's torn hath in the county. And therefore since it hath been shewn in the precedent chapter, at what (a) time and in what place **THE SHERIFF'S TORN** is to be holden; and what persons owe suit to it; and what (b) authority the judge of it hath in relation to his proceeding on (c) indictments; and also in relation to (d) fines and amerciaments; and the (e) appointment of constables; and having also shewn what (f) kind of offences are inquirable in this court; and within what (g) place such offences must arise; and by what (h) jurors, and in what manner indictments in it are to be found; and in what manner they are to be (i) proceeded upon, traversed, and determined; and since **THE COURT LEET** hath regularly the very same jurisdiction with **THE SHERIFF'S TORN** as to all these points, except in some special cases, which have been already taken notice of in the chapter concerning the **SHERIFF'S TORN**; I shall refer the reader to the said chapter for all these particulars.

2. Infl. 71, 72.
22. Ed. 4. 22.

And I shall only consider in this place,

1. The end of instituting the court-leet.

2. How far it exempts those who live within its precincts from the torn.

3. How far it is subject to the oversight of the torn.

4. For what causes it may be forfeited.

5. What ought to be the form of a caption of an indictment in it.

As to **THE FIRST POINT**, the end of instituting the court-leet.

12. H. 7. 2.

2. Infl. 71, 72.

Sec. 2. It seems that anciently all people who now owe suit to any court-leet were bound to come to the sheriff's torn, in order there to take the oath of allegiance to the king,

king, and to be incorporated into some tithing, and for such other purposes as are set forth more at large in the precedent chapter. (*) But it being more for the ease of the people, to have courts of this kind holden in their own townships or manors, by degrees grants of such courts were obtained from the king for most manors and towns, not only by the lords of manors, but also by other persons who had no lands in the places for which they obtained such grants, and for a recompence to such grantees. for the charge and trouble they were supposed to have been at in procuring such grants, it was usual for the inhabitants who had the benefit of them to agree to pay a certain sum of money, called *Capitage*, or *certum letæ, &c.* at every such court-leet; and for the non-payment of this duty or refusal to present it, such grantees may prescribe to amerce the defaulters, and to distrain for the amercement; but no such prescription shall be allowed for any other matter whatsoever of a private nature.

(*) Sect. 2,
1. Jones 283.
6. Coke 77.

Dyer 30.

13. H. 4. 9.
11. Coke 42.
1. Roll 32, 73.
1. R. Abr. 214.
4. Burrow
1861.

As to THE SECOND POINT, viz. How far a court-leet exempts those who live within the precincts of it from the torn.

Sect. 3. It seems to be a general (a) rule, that no man can be within two leets at the same time, and in the same respect; from whence it follows, that he who resides within the precincts of a leet, the lord whereof doth duly hold his court, cannot be compelled to come to the torn, or any other superior leet, for the taking the oath of allegiance, or any other such like purpose, which may be as well answered by his attendance at his own leet. Yet if such private leet have not the general jurisdiction of the torn, but be (b) specially granted for two or three articles of it only, it seems, that the inhabitants within its precinct must attend the sheriff's torn for all such matters of which such private leet hath no jurisdiction. Also it (c) seems to be a good prescription for a grand leet (to which other inferior leets may be subordinate in the same manner as that is to the torn) to oblige the chief pledges, and a certain number of the inhabitants of every town within its precinct, to appear at every such grand leet, to inquire of such offences as have not been inquired of in the inferior leets.

(a) Dalt. Sher.
402, 403.
1. Jones 283.
6. Coke 77.
18. H. 6. 13.
F. Lect. 1.
C. Jac. 584.
Post. c. 10.
Sect. 12.
Con. Kitchen
34.
1. R. Abr. 542.
(b) Keilw.
141, 142.
2. R. Abr. 203.
(c) C. Jac.
583.
Raymond 204.
C. Car. 75, 76.
See chap. 10.
sect. 12. 64.

As to THE THIRD POINT, viz. How far the court-leet is subject to the oversight of the torn.

Sect. 4. It is said, that the sheriff's torn as an (d) overseer of this court, is to inquire whether the tithings be whole or no, and to present defaults that are not redressed in the leet; 387. 391.

(d) Finch 246.
See c. 10.
sect. 64.
Dalt. Sher.
387. 391.

(a) C. Jac.
584.

(b) 2 R. Abr.
203.
Finch 246.

leet; and it seems also, that it may of common right inquire of the concealment of offences inquirable in leets, and of the defaults of the lords of such courts. However it (a) seems clear, that a prescription to this purpose is good. And there is no doubt but that if a leet be (b) seized into the king's hands, all those who owed suit to it ought to come to the torn.

As to THE FOURTH POINT, *viz.* For what causes a court-leet may be forfeited.

(c) Co. Lit.
233.

Kitchen 23.

C. Jac. 155.

9. Co. 50.

2. R. Abr. 155.

11. Ed. 4. 1.

2. H. 7. 11.

(d) 1. Jon.

283.

Keilw. 148.

152.

(e) Kitchen

33.

(f) 1. Jones

283.

(g) F. Leet, 12.

698.

Moor 607.

(i) Kitchen 13.

Carter 29.

Con. Moor 573.

574.

1. Jon. 283.

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Sec. 5. It seems, that this being a franchise not intended to be granted for the private benefit of the grantee, but for the good of the publick, for the more easy and convenient administration of justice, shall not only be forfeited by acts of gross and palpable oppression and injustice, (c) but also by bare omissions, in not making it answer the end of its institution; as in the not (d) punishing offenders in the same manner as the law requires, or in (e) neglecting to hold a court when it ought to be holden (at least if such neglects be often repeated, and without a reasonable excuse), or in not (f) providing an able steward to discharge the office, or in not taking care to have such other officers, or other things as are necessary for the execution of justice, as constables and ale-tasters, &c. and (g) pillory and tumbrel; but it is (h) said, that a vill may be bound by prescription to provide a pillory and tumbrel, and (i) that every vill is bound of common right to provide a pair of stocks, *Quære.*

As to THE FIFTH POINT, *viz.* What ought to be the form of the caption of an indictment in a court-leet,

(k) Vide sup.
c. 10. sect. 9.
Salkeld 195.

It hath been (k) resolved,

Sec. 6. FIRST, That the caption of an indictment, *ad cur. viz. franc. pleg. cum cur. baron. &c.* is good; for that the words *cum cur. baron.* shall be rejected; and it cannot but be intended that the indictment was taken by that court, which alone hath the colour of authority to take it.

Salk. 200.

Sec. 7. SECONDLY, That the not setting forth in the caption whether such court be holden by *grant* or *prescription* is helped by a multitude of precedents.

See Colebroke
v. Elliot, 3.
Burr. 1863.

+ *Sec. 8.* These courts were very properly adapted to the customs, manners, genius, and policy of a people upon their first settlement; but, like all other human jurisdictions, have

have varied in the course and progress of time, as the government and manners of the people took different turns and fell under different circumstances; and the business of THE SHERIFF'S TORN and of THE COURT LEET hath of late years declined and fallen in general on THE QUARTER SES-^{4. Bl. Com.}
sions of the several counties throughout the kingdom. 271,

CHAPTER THE TWELFTH.
OF ARRESTS
BY
PRIVATE PERSONS.

HAVING thus endeavoured to shew the nature of the courts which have jurisdiction over criminal offences, I am now to shew in what manner offenders are to be proceeded against by such courts.

And in order hereto I shall consider,

1. How they are to be apprehended.
2. In what manner and in what cases they are to be bailed.
3. In what cases and in what manner they are to be committed to prison.
4. How far they and their assistants are punishable for a hindrance in bringing them to public justice.

As to the first of these points I shall consider,

FIRST, In what manner such offenders are to be apprehended by private persons.

SECONDLY, In what manner by public officers.

THIRDLY, In what cases it is lawful to break open doors in order to apprehend them.

As to arrests of such offenders by private persons, I shall examine

1. Where arrests of this kind are commanded and enjoined by law.
2. Where they are permitted by law.
3. Where they are rewarded.

As to THE FIRST POINT, viz. In what cases arrests by private persons are commanded and enjoined by law.

Sec. 1. It seems clear, that (a) all persons whatsoever who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect, (b) unless they were under age at the time.

(b) F. Cor. 395. 2. Hale 75, 76.

(a) 3. Inst. 53.
139. 152.
Sum. 89, 90.
1. Hale 448.
3. H. 7. c. 1.
2. Inst. 52.
F. Cor. 293.
1. Black. 561.

Sec. 2. And for this (c) cause, by the common law, if any homicide be committed, or dangerous wound given, whether with or without malice, or even by (d) misadventure or self-defence, in any town or in the (e) lanes or fields thereof, in the day time, and the offender escape, the town shall be amerced, and if out of a town, the (f) hundred shall be amerced.

293. 299. 352. 425. Con. 1. Leon. 107. (d) 2. Inst. 315.
(e) Dyer 210. (f) S. P. C. 34.

(c) Summ. 90.
2. Hale 73. 75.
76.
3. H. 7. c. 1.
3. Inst. 53.
4. Inst. 183.
C. Car. 252.
3. Leon. 207.
F. Cor. 238.
F. Cor. 302.

Sec. 3. And since the statute of Winchester, c. 5. which ordains that (g) walled towns shall be kept shut from sun-setting to sun-rising, if the fact happen in any such town by night or by day, and the offender escape, the town shall be amerced.

(g) S. P. C. 34.
3. Inst. 53.
7. Coke 6, 7.

Sec. 4. And as all (h) private persons are bound to apprehend all those who shall be guilty of any of the crimes above-mentioned in their view, so also are they with the utmost diligence to pursue, and endeavour to take all those who shall be guilty thereof out of their view, upon a HUE AND CRY levied against them.

(h) Sum. 90.
1. Hale 448.
484. 592.
2. Hale 75, 76.
3. Inst. 117.
2. Inst. 172.

Sec. 5. (i) HUE AND CRY is the pursuit of an offender from town to town till he be taken, which all who are present when a felony is committed, or a dangerous wound given, are, by the common law as well as by statute, bound to raise against the offenders who escape, on pain of fine and imprisonment. Also it (k) seems certain, that a man may lawfully raise it against one who sets upon him in the highway to rob him. It is also enacted by the statute of Winchester, 13. Edw. 1. c. 4. (l) that the hue and cry shall be levied upon any stranger who shall not obey the arrest of the watch in the night-time; and (m) 21. Edw. 1. it. 2. which was made against trespassers in forests, chases, parks and warrens, seems to allow the levying thereof upon any such offenders. But if a man take upon him to levy a hue and cry without sufficient cause, he shall be punished as a disturber of the peace.

(i) 3. Inst. 116, 117.
1. Hale 588.
2. Hale 99, 102.
Dalton 109.
2. Inst. 172.
F. Corone 395.
C. Eliz. 654.
Crom. 178.
179.
Bracton 3. c. 1.
(k) 9. E. 4. 26.
(l) Cro. Eliz. 204.
Savil. 83.
Vide also 4.
Edw. 1. stat. 2.
De officio coronatoris.
(m) 29. E. 3.

39. F. Tres. 252. Crompton 179. 2. Hale 100, 101. 21. H. 7. 28.

Sec. 6.

Sett. 6. In order rightly to raise a HUE AND CRY, you ought to go to the constable of the next town, and declare the fact, and (a) describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make a search for the offender; and, upon the not finding him, to send the like notice, with the utmost expedition, by horsemen as well as footmen, to the constables of all the neighbouring towns, who ought, in like manner, to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found.

(b) **B. 1. c. 63. sect. 13.** **Sett. 7.** Also every (b) private person is bound to assist an officer demanding his help for the taking of a felon, or the suppressing an affray, or apprehending the affrayers, &c.

(c) This is not a penal law within the statutes of Jeofail. **Cro. Jac. 496. 12. Mod. 242. Rastal 406. Latch. 127. Cro. Eliz. 142. 270. 753. Brook, Debt, 103.** † Also by the *statutes of Winton*, (c) 13. **Edw. 1. ft. 2. c. 1. & 2. and 28. Edw. 3. c. 11.** it is enacted, “That immediately upon robberies and felonies committed, fresh suit shall be made from town to town; and if the country will not answer for the bodies of such offenders within the space of forty days (d), the inhabitants of the whole hundred, where the robbery (e) shall be done, with the franchises, being within precinct of the same, shall be answerable for the robberies done (f), and also the damages.”

Godbolt 58. 7. Co. 6. 2. Inst. 569. 1. Sid. 11. (d) 3. Lev. 320. Herne 215. Thefaurus Brevium 141. 2. Saund. 376. (e) Cro. Jac. 187. 118. Yelv. 116. Noy 125. Shower 94. Andr. 115. 117. Comb. 160, 161.

(f) The robbery must be done openly, and with force and violence, **7. Co. 6. 7. Salkeld 614. Styles 427.** and not in any house, **Moor 620. 3. Leon. 262. Cro. Jac. 496. Cro. Eliz. 753.** Sed vide **7. Mod. 160. 157.** But it is not necessary to be in a highway, **7. Mod. 159.** in a private way or in a coppice is sufficient, **2. Salk. 614. Carth. 71. Wilton 412. 437. Lord Raymond 828. 11. Modern 8. Strange 1011. or on Sunday, Cro. Jac. 496. Strange 406.**

a. Vent. 215. † But these statutes being thought oppressive in subjecting the hundred to an action notwithstanding its utmost exertions to apprehend the offender; and also to force the surrounding hundreds, as well as the party robbed, to contribute their assistance to attain the ends of public justice; it is enacted by the **27. Eliz. c. 18.** “That the inhabitants of every hundred wherein negligence, fault, or defect of pursuit and fresh suit, after hue and cry made, shall happen to be, shall answer and satisfy by the one moiety of the damages, as shall by force of the said statutes be recovered against the hundred in which any robbery or felony

“felony shall be committed (a).”—“That no hue and cry, or pursuit by the country, or inhabitants of any hundred, shall be allowed and taken to be a lawful hue and cry upon, or pursuit after any the said felons or offenders, except the same be done and made by horsemen and footmen.”—“That no person robbed shall maintain any action upon these statutes, unless he shall, with as much convenient speed as may be, give intelligence of the felony to some of the inhabitants of some town, village, or hamlet, near unto the place where such robbery shall be committed; and also, first, within twenty days next before such action brought, be examined upon oath, before some justice of the peace of the county, inhabiting in the hundred where the robbery was committed, or near the same, whether he knew the felons or robbers, or any of them; and if upon such examination it be confessed that he does know them, he shall before action brought, enter into bond before the said justice, effectually to prosecute the said robbers by indictment or otherwise.”

(a) To be recovered at Westminster, in the name of the clerk of the peace, and for the use of the hundred where the offence is committed; which suit shall not abate by his death or removal. Dyer 370. Cro. Jac. 675. 3. Mod. 287. Co. Ent. 348. Clift. 378. Rastal 406. Cro. Eliz. 142.

C. Car. 26. 37. 2. Salkeld 614.

But by 8. Geo. 2. c. 16. “No person shall maintain any action upon the above-recited statutes, unless he shall, over and above the intelligence required to be given by the *statute of Elizabeth*, give notice of the robbery committed on him to one of the constables of the hundred, or to some constable or officer of some town, parish, hamlet, village, or tithing, near unto the place where such robbery shall happen, or shall leave notice (b) in writing of such robbery at the dwelling-house (c) of such constable or officer, describing in such notice, the felon, or felons, and the time and place of the robbery; and also shall within the space of twenty days (d) next after the robbery committed, cause public notice to be given thereof in the *London Gazette*, therein likewise describing the felon or felons (e), and the time and place of such robbery, together with the goods (f) and effects whereof he was robbed; and shall also before any such action commenced, go before the chief clerk, secondary, or filazer of the county where the robbery happened, or the clerk (g) of the pleas wherein such action is intended to be brought, or their respective deputies, or before the sheriff of the county where the robbery shall happen, and enter into a bond (gratis) to the high constable, who is authorized to support or defend such action of the hundred, in the penal sum of 100*l.* with two sufficient sureties for securing the due payment of his costs in case he should be nonsuited, &c.”

(b) Strange 406. 1170. Comyns 345. (c) Wilton 105. 109. (d) March 11. Cro. Car. 211. Noy 21. 3. Lev. 328. Sid. 45. 209. (e) 2. Wils. 105. 109. 113. (f) 2. Barnes 371. 458. (g) Andr. 116.

1. Term Rep. 71.

March. 10, 11. † By 8. Geo. 2. c. 16. f. 3. "No hundred or franchise
 2. Sid. 11. "therein shall be chargeable by virtue of these statutes, if
 "one or more of the felons be apprehended within forty
 (a) Doug. 704. "days (a) next after such public notice given in the *Lons-*
 " *den Gazette*."

† By 8. Geo. 2. c. 16. f. 11. "Every constable or officer
 "to whom notice shall be given as aforesaid, and every con-
 "stable of the hundred; and every constable, boroughholder,
 "headborough, or tithingman, of any town, parish, vil-
 "lage, hamlet, or tithing within the hundred, or the fran-
 "chises within the precinct thereof, wherein such robbery
 "shall happen, shall with the utmost expedition make
 "and cause to be made fresh suit, and hue and cry after the
 "felon or felons, on pain of forfeiting five pounds."

10. Modern † But by Geo. 2. c. 16. f. 12. "No action, suit, or in-
 193. "formation, shall be brought unless within six months
 Hobart 139. "next after the matter or thing done; in which action an
 Moor 878. "inhabitant of any hundred may be a witness."
 Brownlow 156.
 Siderfin 139.

† By 22. Geo. 2. c. 24. no person whatever shall recover
 against any hundred more than 200*l.* unless the person so
 robbed shall at the time of the robbery be together in com-
 pany, and be in number two at least, to attest the truth of
 the same; nor by 30. Geo. 2. c. 3. and 4. Geo. 3. c. 2. f. 118.
 unless three persons be present, if the plaintiff is receiver of
 the land-tax.

ARRESTS of offenders by private persons permitted by law,
 are either, By their own authority; or, By a warrant from
 a justice of peace.

Arrests of this kind by their own authority, are either, In
 respect of treason or felony; or, In respect of inferior of-
 fences.

Arrests of this kind in respect of Treason or Felony,
 are either, For the suspicion of such crimes already done,
 or supposed to have been done; or, To prevent their being
 done.

As to such arrests for such suspicion, I shall endeavour
 to shew,

1. What are sufficient causes of suspicion.

2. By whom the person arrested must be suspected.

3. Whether

3. Whether any such cause will justify an arrest, where no treason or felony at all hath been committed, or dangerous wound given.

4. In what manner an arrest for such suspicion is to be justified in pleading.

SECT. 8. As to the first particular, *viz.* What are sufficient causes of suspicion, I shall take notice of some of the principal of them, which are generally agreed to justify the arrest of an innocent person for felony.

SECT. 9. FIRST, The common (a) fame of the country. (a) 2. H. 7. But it (b) seems, that it ought to appear upon evidence, in an action brought for such an arrest, that such fame had some probable ground. 1. Hale 588. 2. Hale 81. 5. H. 7. 4. 5.

11. E. 4. 4. Dyer 236. Bridg. 62. 7. E. 4. 20. Summary 91. Keilw. 81. Pulton 13. (b) 2. Inst. 52. Crom. 98; 99. S. P. C. 97. Braddon 143. and see the case of Ledwich v. Catchpole, Cald. 291.

SECT. 10. SECONDLY, The (c) living a vagrant, idle, and disorderly life, without having any visible means to support it. (c) 7. E. 4. 20. 17. E. 4. 5. Summary 91. Pulton 13.

SECT. 11. THIRDLY, The being in (d) company with one known to be an offender, at the time of the offence; or (e) generally at other times keeping company with persons of scandalous reputations. (d) 7. E. 4. 20. Keilwood 71. Pulton 3. Summary 91. (e) 2. Inst. 52. Crom. 98.

SECT. 12. FOURTHLY, The being found in such circumstances as induce a strong presumption of guilt; as (f) coming out of a house wherein murder has been committed, with a bloody knife in one's hand; or being found in (g) possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. (f) 11. E. 4. 4. 12. Co. 92. (g) 7. E. 4. 20. C. Eliz. 901. C. Jac. 190. Pulton 36. Summary 91. Moor 600.

SECT. 13. FIFTHLY, The behaving one's self in such manner as betrays a consciousness of guilt; as (b) where a man being charged with a treason or felony, says nothing to it, but seems tacitly by his silence to own himself guilty: or where a man accused of any such crime, upon hearing that a warrant is taken out against him, doth abscond. (b) Crom. 98. 99. F. Cor. 24.

SECT. 14. SIXTHLY, The being (i) pursued by an HUE AND CRY. (i) 29. El. 871. 29. E. 3. 39. Summary 91. F. Tref. 252. 5. H. 7. 5. 21. H. 7. 28.

As to the second particular, *viz.* By whom the person must be suspected upon such an arrest for suspicion.

(a) 10. H. 7. *Sec.* 15. It seems to be (a) agreed, that the law hath so tender a regard to the liberty and reputation of every person, that no causes of suspicion whatsoever, let the number and probability of them be ever so great, will justify the arrest of an innocent man, by one who is not himself induced by them to suspect him to be guilty, whether he make such arrest of his own head, or in obedience to the commands of a private person, or even of a constable (b).

17.
2. Hale 79.
2. H. 7. 15.
7. Ed. 4. 20.
20. E. 4. 6.
11. E. 4. 4.
C. Eliz. 871.
12. Co. 92.
17 E. 4. 5.

(b) It appears to be decided by the case of *Samuel v. Payne and others*, on a motion for a new trial in Easter Term, 20. Geo. 3. that constables and their assistants are justified in arresting a man upon a given charge of felony, even although the goods charged to have been stolen are not found by them upon the search-warrant, and the jury find that no felony was committed. The strict rule of law, "that if a felony has *actually* been committed, any man upon reasonable probable grounds of suspicion may justify apprehending the suspected person to carry him before a magistrate, but that if no felony has been committed, the apprehension of a person cannot be justified by any body," was considered as inconvenient and narrow; because if a man charge another with felony, and require an officer to take him into custody and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine and commit or discharge. The authorities cited were, Ward's case, Clayton 44. pl. 76. 2. Hale 84. 89. 91. 2. Hawkins, c. 12. and 13. But the learned reporter adds, that none of them come up to the present case; and that it is therefore the first determination of the point, Douglas 359. 360. B. R. East. 23. Geo. 3. and in the case of *Ledwick and Catchpole*, it was decided that a constable or other peace-officer may justify an arrest for felony on *probable evidence* that a felony has been actually committed, although no *positive charge* be made, Caldecot's Cases 291.

As to the third particular, *viz.* Whether any such cause of suspicion will justify an arrest where no treason or felony at all hath been committed, or dangerous wound given.

(c) 2. Inst. 173. *Sec.* 16. It is holden in some (c) books, that none of the above-mentioned causes will, in any case, justify the arresting a man for the suspicion of a crime, where in truth no such crime hath been committed either by him or any other person whatsoever. But howsoever this rule may in general be true, it seems very hardly maintainable in the case of an arrest of an innocent person upon a HUE AND CRY levied against him, in such a place where his character is unknown, and with such other circumstances, that the people of the county have no reason to presume it groundless; for in such cases, it would be a great inconvenience to discourage persons from following a hue and cry with that vigour and diligence which the law expects and the public good requires,

1. C. Jac. 194.
2. Hale 78.
Summary 91.
2. H. 7. 3.
27. H. 8. 23.
8. E. 4. 3.
3. Inst. 118.
F. Tref. 252.
29. E. 3. c. 39.
2. R. A. 559.
Doug. 360.

requires, by making them liable to an action if it should in the event prove to have been levied without sufficient cause, which they cannot take time to examine without delaying their pursuit: And since the person injured by such an ill-grounded hue and cry has a good action against him that raised it, there seems to be no necessity that he should also have a remedy against another. And this opinion seems to be the more plausible, for that among the (a) books (b) cited to maintain the contrary, (c) that which alone doth directly affirm it, seems to go upon an argument manifestly inconclusive; for it says, that an hue and cry is not a sufficient authority to arrest a man unless a felony be done, because the words of the statute of *W^{ill}iam the first*, c. 9. are, "that all men shall be ready upon hue and cry to arrest felons," but where no felony is done, there can be no felon, &c. To this it may be replied, that this argument, if it prove any thing, proves that none but felons can be arrested on a HUE AND CRY, which seems to be manifestly false; for it is agreed by all the books, that if a felony be actually committed, an innocent person, on whom a HUE AND CRY for it is levied, may lawfully be arrested: Also there seems to be no doubt, but that he who barely attempts to rob a man, or who dangerously wounds him, may safely be pursued and taken by a HUE AND CRY, and yet there is no pretence to call such a person a felon (d).

(a) 29. E. 3.
c. 39.
11. E. 4. c. 4.
2. H. 7. c. 15.
(b) 2. Inst. 173.
(c) 5. H. 7. c. 5.

(d) Now by
7. Geo. 2. c.
21. an assault
with intent to
rob is felony.
Vide Book 1.
p. 148.

Self. 17. And if it be granted lawful to arrest a man on a HUE AND CRY where no felony hath been committed; from the like grounds it seems also to follow, that it is lawful to arrest a man on the warrant of a justice of peace, where no felony hath been committed. But this point shall be more fully considered in the next chapter.

As to the fourth particular, *viz.* In what manner an arrest for such suspicion is to be justified in pleading.

Self. 18. It seems to be certain, that whoever would justify the arrest of an innocent person by reason of any such suspicion, must not only shew that he suspected the party (e) himself, but must also set forth the (f) cause which induced him to have such a suspicion, that it may appear to the Court to have been a sufficient ground for his proceeding (g). Also it seems (h) certain, that regularly he ought expressly to shew, that the very same crime for which he made the arrest, was actually committed. But (i) if a man have several causes

(e) Antesect.
15.
(f) 2. Inst. 52.
Finch 340.
17. E. 4. 5.
1. E. 4. 20.
Bridgman 62.
2. Hale 78.
7. H. 4. 35.

(g) But by 24. Geo. 2. c. 44. officers are now admitted to plead the general issue and to give the special matter in evidence. (h) 8. E. 4. 3. 27. H. 8. 23. C. Jac. 194. Finch 340. (i) 7. E. 4. 20. 2. Hale 81. 17. E. 4. 5. Bridgman 62. Finch 394.
♦ H. 7. 1, 2.

of such suspicion, he is not bound to insist upon some one of them only, but may alledge them all, for that the replication *de son tort demesne* answers the whole; as (a) where a man arrests another, who is actually guilty of the crime for which he is arrested, it seems that he needs not, in justifying it, set forth any special cause of his suspicion, but may say in general, that the party feloniously did such a fact, for which he arrested him, &c.

(a) 10. E. 4.
17.
F. Faux
Impris. 5.

Sett. 19. As to the arresting of offenders by private persons of their own authority, permitted by law for the prevention of *treason* or *felony* only intended to be done; it (b) seems, that any one may lawfully lay hold on another, whom he shall see upon the point of committing a *treason* or *felony*, or doing any act which would manifestly endanger the life of another, and may detain him so long till it may reasonably be presumed that he hath changed his purpose. And upon this ground it (c) seemeth to be the better opinion, that not only a constable, but any private person, who shall see another expose an infant in the street, and refuse to take it away, may lawfully apprehend and detain him till he shall consent to take care of it.

(b) 9. E. 4.
16.
See B. 1. c.
60. 23.

(c) Pop. 12, 13.
Owen 98.
Moor 284.
a. Hale 88.

Sett. 20. As to the arrest of offenders by private persons of their own authority permitted by law for *inferior offences*; it (d) seems clear, that regularly no private person can of his own authority arrest another for a bare breach of the peace after it is over; for if an officer cannot justify such an arrest without a warrant from a magistrate, surely *a fortiori* a private person cannot. Yet it is holden by (e) some, that any private person may lawfully arrest a suspicious *night-walker*, and detain him till he make it appear that he is a person of good reputation. Also it hath been (f) adjudged, that any one may apprehend a common *notorious cheat* going about the country with false dice, and being *actually caught playing with them*, in order to have him before a justice of peace; for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate, would often give them an opportunity of escaping. And from the reason of this case it seems to follow, that the arrest of any other offenders by private persons, for offences in like manner scandalous and prejudicial to the public, may be justified.

(d) See B. 1.
c. 63. sect. 13,
14. 17.

(e) Latch. 173.
Vide the case
of the Queen
v. Tooley,
Ed. Ray. 1296.
4. H. 7. 18.
Popham 208.
2. Hale 89.
Qu. 4. H. 7.
i. b. 2.
5. H. 7. 5.
2. Inst. 52.
(f) 1. Jon. 249.
C. Car. 234.
2. R. Ab. 546.

Crom. 147.
14 H. 8. 16.

Sett. 21. As to arrests of such offenders by private persons having a warrant from a justice of peace permit-

ted. by law, there is no doubt but that where the law authorises justices of peace to direct their warrants to such persons, it doth implicitly authorise the execution of them by them.

it is said, will not justify any one in the execution of it.

As to the THIRD GENERAL POINT of this chapter, viz. In what cases the arrests of offenders by private persons are rewarded by law, I shall give a short account of the statutes concerning this matter, in relation—To robbers in highways—To counterfeiterers and clippers of the coin—To shoplifters and other offenders of like nature—To burglars and felonious breakers of houses—To offenders on the black act—To discharging the hundred—To stealing sheep, &c.—To felons convict—To smugglers;—and To theftbooters.

Sett. 22. AND FIRST, As to robbers in high-ways. By 4. & 5. Will. & Mary, c. 8. "Whoever shall apprehend and take one or more thief or robber in any highway or road in *England* or *Wales*, and prosecute him or them till he or they be convicted of any robbery committed in or upon any highway (1), passage, field or open place, shall receive from the sheriff of the county where such robbery and conviction shall be, without paying any fee for the same, for every such offender so convicted FORTY POUNDS within one month after such conviction and demand thereof made, by tendering a certificate to the said sheriff under the hand or hands of the judge or justices before whom such felon or felons shall be convicted; and in case any dispute shall arise between the persons so apprehending any the said thieves and robbers touching their right to the said reward, the said judge or justices so respectively certifying, shall by their said certificate direct and appoint the said reward to be paid in such shares and proportions as to them shall seem just and reasonable. And if any such sheriff shall die or be removed before the expiration of one month after such conviction and demand made, the next sheriff shall pay the same within one month after demand and certificate brought as aforesaid: And the sheriff making default in paying the said sum, shall forfeit double as much."

But the warrant of a justice where he has not power to grant one, *Strange 102a,*

(1) By 6. Geo. 1. c. 23. sect. 8. the streets of London and Westminster, and other cities, towns and places shall be deemed and taken to be highways to all intents and purposes, within the intent and meaning of this act.

Reward for apprehending robbers.

Sett. 23. By 4. & 5. Will. & Mary, c. 8. "If any person shall be killed by any such robber in endeavouring to apprehend, or making pursuit after him, the executors or administrators, &c. of such person shall receive forty pounds from the sheriff, &c. upon certificate delivered under the hands and seals of the judge or justices of assize for the county where the fact was done, or the two next justices

Gratuity in case of death.

“ of the peace, of such person being so killed, which certificate the said judge, or justices, upon sufficient proof before them made, are immediately required to give without fee or reward.”

A further reward.

Stat. 24. By 4. & 5. Will. & Mary c. 8. “ Every person who shall so take, apprehend, prosecute, or convict such robber as aforesaid, shall have, as a farther reward, the horse, furniture, and arms, money and other goods of such robber, that shall be taken with him; any their Majesties right or title, bodies politic or corporate, or the right or title thereunto of the lord of any manor or franchise, or of him or them lending or letting the same to hire to any such robber notwithstanding: Provided that this shall not be extended to take away the right of any person to such horses, furniture and arms, money or other goods, from whom the same were before feloniously taken.”

Reward for apprehending coiners.

Stat. 25. SECONDLY, As to counterfeiters and clippers of the coin. By 6. & 7. Will. 3. c. 17. “ Whoever shall apprehend any person who shall counterfeit any of the current coin of this realm, or for lucre clip, wash, file, or otherwise diminish the same, or shall cause to be brought into the kingdom any clipt, false, or counterfeit coin, and prosecute such person to conviction, shall have from the sheriff of the county where such conviction shall be, FORTY POUNDS upon the judge’s certificate, &c.”

(a) Vide Bk. 1. ch. 17. sect. 64.
(b) Vide Bk. 1. ch. 18. sect. 4.
(c) Vide Bk. 1. page 71. & 72.

† By 15. Geo. 2. c. 28. s. 7. (for preventing the counterfeiting the coin) “ Whoever shall apprehend any person or persons who have committed any of the offences hereby made high treason (a) or felony (b), or who shall have made or counterfeited any of the copper money as mentioned in the act (c), and shall prosecute such offenders until he she or they shall be thereof convicted, such prosecutor and prosecutors shall have and receive from the sheriff or sheriffs of the county or city where such conviction shall be made, for every such offender so convicted of treason or felony, the sum of forty pounds; and for every person so convicted of counterfeiting any of the copper-money, the sum of ten pounds, without paying any fee for the same, within one month after such conviction and demand thereof made upon the judge’s certificate, &c.”

Shoplifters.

Stat. 26. THIRDLY, As to shoplifters, &c. By 10. and 11. Will. 3. c. 23. “ Whosoever shall take and prosecute to conviction any person who by night or day shall in any shop

“shop, warehouse, coach-house, or stable, privately and feloniously steal any goods, wares, or merchandizes, of the value of 5s. (though such shop, &c. were not broken, and though no person were in such shop, &c.) or shall assist, hire, or command any person to commit such offence, shall have a certificate thereof *gratis* from the judge or justices, expressing the parish or place where such felony was committed; and if any dispute shall happen about the right to such certificate, the judge or justices shall direct and appoint the said certificate into so many shares, to be divided among the persons therein concerned, as to the said judge, &c. shall seem reasonable, (a) which certificate (before any benefit has been made of it) may be once assigned over, and no more, and the original proprietor or assignee shall by virtue thereof be discharged from all parish and ward offices, within the parish or ward wherein the felony was committed; and the said certificate shall be enrolled by the clerk of the peace of the county for the fee of one shilling: And in case any person happen to be slain by any such felons by endeavouring to apprehend them, his executors, &c. shall have the like reward, &c.”

N. B. If a horse be stolen out of the stable or other curtilage in the night-time it is *burglary*; if in the day-time, it is *larceny from the house*; and in this way, whoever convicts an offender in horse-stealing, is intitled to the reward. (a) The practice is to make the prosecutor or person to whom the certificate is given

pay a proportionate share of its value to the other witnesses produced on the part of the Crown.

SECT. 27. FOURTHLY, As to *burglars* and felonious *breakers of houses*. By 5. Ann, c. 31. “Every person who shall take any one guilty of burglary, or the felonious breaking and entering any house in the day-time, and prosecute them to conviction, shall receive, above the reward given by the above-mentioned statute of 10. and 11. Will. 3. the sum of 40*l.* within one month after such conviction;” concerning which the same rules in effect are prescribed, as are provided by the above-mentioned statute of 4. and 5. Will. and Mary, c. 8. concerning the reward of 40*l.* to be paid to those who shall apprehend a highwayman.

Hou break-
ers.

† SECT. 28. FIFTHLY, As to offenders on the *black act*. By 9. Geo. 1. c. 22. s. 12. “If any person or persons shall apprehend or cause to be convicted, any of the offenders mentioned in the act, and shall be killed, or wounded so as to lose an eye, or the use of any limb, in apprehending or securing, or endeavouring to apprehend or secure any of the said offenders, upon proof thereof made at the general quarter sessions of the peace for the county or place where all the provisions of this act, “for making satisfaction and amends, and for the encouragement of persons to apprehend offenders,” are extended to the destroyers of sea-banks, &c. cutting hopbinds; and setting fire to coal-pits. Vide b. 1. p. 159. § 3. 1. 224

By 10. Geo. 2.
c. 32. sect. 4.

“the

“ the offence was or shall be committed, or the party killed,
 “ or receive such wound, by the person or persons so apprehending and causing the said offender to be convicted, or
 “ the person or persons so wounded, or the executors or administrators of the party killed, the justices of the said sessions
 “ shall give a certificate thereof to such person or persons so wounded, or to the executors or administrators of the party
 “ so killed, by which he or they shall be entitled to receive of
 “ the sheriff of the said county the sum of 50*l.* to be allowed the said sheriff in passing his accounts in the Exchequer; which sum of 50*l.* the said sheriff is hereby required to pay within thirty days from the day on which the said certificate shall be produced and shewn to him, under the penalty of forfeiting the sum of 10*l.* to the said person or persons to whom such certificate is given; for which sum of 10*l.* as well as the said sum of 50*l.* such person may bring an action upon the case against the sheriff, as for money had and received to his or their use.”

Reward for
 discharging
 the hundred.

+ *Stat.* 29. SIXTHLY, As to discharging the hundred upon HUE AND CRY. By 8. Geo. 2. c. 16. s. 9. “ Who-
 “ ever shall apprehend such felon or felons, as described
 “ by, and within the time limited in, the act, whereby the
 “ hundred is actually discharged, shall on due proof thereof
 “ upon oath before two justices, be entitled to a reward
 “ of 10*l.*”

Stealing cat-
 tle.

+ *Stat.* 30. SEVENTHLY, As to *stealing sheep* or other cattle. By 14. Geo. 2. c. 6. explained by 15. Geo. 2. c. 34.
 “ All and every person and persons who shall apprehend and
 “ prosecute to conviction, any offender or offenders guilty
 “ of any of the offences mentioned in these acts, shall have
 “ the sum of ten pounds, to be paid within one month after
 “ such conviction, by the sheriff where the offence was committed, without any deduction whatsoever, he or they
 “ tendering a certificate, signed by the judge, before the end
 “ of the sessions or assizes, certifying such conviction, and
 “ where the offence was committed, and that such offender
 “ was apprehended and prosecuted by the person or persons
 “ claiming the said reward; and on default of payment
 “ within one month, the sheriff shall forfeit double the sum
 “ to the party or his representatives.”

Reward for
 apprehending
 those who re-
 turn from
 transporta-
 tion.

+ *Stat.* 31. EIGHTHLY, As to felons convicted. By
 16. Geo. 2. c. 15. 8. Geo. 3. c. 15. 24. Geo. 3. c. 56. and
 25. Geo. 3. c. 46. “ Whoever shall discover, apprehend,
 “ and prosecute to conviction of felony without benefit of
 “ clergy, any felon or other offender ordered for transpor-
 “ tation, or who shall have agreed to transport himself, who
 “ shall

“ shall be afterwards found at large in Great Britain, without some lawful excuse, before the expiration of his or their term, shall be intitled to a reward of 20*l.* for every such offender so convicted as aforesaid, and shall have the like certificate and like payments as any person may be intitled to for apprehending, prosecuting, and convicting of highwaymen (2).”

(2) Vide *supra*, section 22.

† *Seet.* 32. NINTHLY, As to *smugglers*. By 19. Geo. 2. c. 34. s. 6. “ If any officer or officers of his Majesty’s revenue, or other persons being employed in the seizing, conveying or securing any wool, or other goods forfeited on account of their being prohibited or accustomed goods, or on account of the duties chargeable thereon not having been paid or secured, or by virtue of any law made to prevent the exportation of wool or other goods, or in endeavouring to apprehend any offender against this act, shall be beat, wounded, maimed, or killed, by any offender against this act, or the said wool or other goods so seized shall be rescued by persons so armed as the act describes; in all such cases respectively, the inhabitants of every rape or lath, in such counties as are divided into rapes or laths, and in every other county the inhabitants of every hundred where such facts shall be committed, in *England*, shall make full satisfaction and amends for all the damages which such officers or persons shall respectively suffer by such beating, wounding and maiming respectively, and by the loss of such goods so seized and rescued; and shall also pay the sum of 100*l.* for each person so killed, to the executors or administrators of such officer or other persons so killed as aforesaid; and such respective officers and other persons, and their executors or administrators, shall be, and are hereby enabled to sue for and recover such their damages, so as the sum to be recovered for any such beating, wounding, or maiming, shall not exceed 40*l.* nor for the loss of the goods 200*l.* against the inhabitants of the said rape or lath in such counties as are divided into rapes and laths, and in every other county the inhabitants of every hundred, who by this act shall be made liable to answer all or any part thereof.”—Notice of the offence must be given to two or more inhabitants near to the place where it happens; and, within eight days, the party must declare, by examination upon oath, before a justice of the peace, whether he knows the offender, pursuant to the directions of 8. Geo. 2.; and if the offender be apprehended and convicted within six months, no satisfaction shall be made.

Reward for apprehending smugglers. Vide 8. Geo. 2. c. 18. sect. 8. 9. Geo. 2. c. 35. sect. 16.

Actions to be brought within a year, sect. 9.

These damages are to be rateably taxed upon the inhabitants, and levied as by 8. Geo. 2. c. 16.

(a) Vide the second section of the act recited, Bk. 1. ch. 58. app. 6. sect. 2.

† *Seet. 33.* By 19. Geo. 2. c. 34. s. 10. "All and every person
" and persons who shall apprehend and take, or discover so
" that he may be taken, any person in *England* who shall
" have been advertised in the manner the act directs, and
" shall not have surrendered him or themselves within the
" forty days (a), and cause him to be brought before the lord
" chief justice of the king's bench, or before any one of
" the justices of the said court, or any one of his Majesty's
" justices of the peace for *London* or *Middlesex* (who is here-
" by required to commit such person to the prison of NEW-
" GATE for such felony), shall have and receive, for every such
" person who shall be so apprehended, the sum of 500*l.* to
" be paid within one month after execution shall be award-
" ed against such offender so apprehended and committed as
" aforesaid by the commissioners of the customs or excise re-
" spectively, who are hereby required to receive the applica-
" tions of all such who are concerned in such discovering
" or apprehending such offender, and determine who are
" entitled to the said reward, and their respective shares and
" proportions thereof; and the same shall be divided amongst
" such persons as aforesaid, in such shares and proportions
" as to the said commissioners respectively, or to the major
" part of them shall seem reasonable."

Offender dis-
covering,

† *Seet. 34.* And it is also further enacted, "That if any
" such offender against whom no such order of council shall
" have been made, shall himself so discover or apprehend
" any other offender, against whom such order shall have
" been made, he shall be discharged and acquitted of such
" his own offence, and all other the like offences then be-
" fore committed, and for which no prosecution shall have
" been then commenced, and shall also have his share of the
" reward."

Gratuity in
case of death
or hurt,

† *Seet. 35.* And it is further enacted, "That if any
" person or persons shall happen to lose a limb, or an eye, or
" be otherwise grievously maimed or wounded in the appre-
" hending or endeavouring to apprehend, or making pursuit
" after such offender or offenders, all and every person or
" persons so wounded and maimed as aforesaid, shall upon
" application to the commissioners of the customs or excise
" respectively as aforesaid, have and receive the sum of fifty
" pounds, over and above any other reward that he or they
" may be intitled to as an apprehender by virtue of this act;
" and in case any person or persons shall happen to be killed
" in the taking or apprehending, or endeavouring to appre-
" hend, or in making pursuit after any such offender or of-
" fenders, that then the executors or administrators of such
" person or persons so killed as aforesaid, upon application

" to

“ to the commissioners as aforesaid, and laying sufficient
 “ proof before them of such person being killed as aforesaid,
 “ shall have and receive the sum of one hundred pounds.
 “ All which rewards before mentioned shall be paid to the
 “ several and respective persons who shall become intitled
 “ thereto as aforesaid, by the receiver-general of the customs,
 “ or cashier of the excise respectively, upon an order direct-
 “ ed to them for that purpose by the commissioners of the
 “ customs or excise.”

† *Secl. 36.* And it is further enacted by the said statute,
 par. *v.* “ That if any of the said offender or offenders in
 “ *England*, at any time before order in council made as by
 “ the act is directed (*a*), shall discover two or more accom-
 “ plices therein to the commissioners of the customs or ex-
 “ cise respectively, and apprehend them, or cause them to be
 “ apprehended, so as they, or two of them at least, may be
 “ brought to justice, and convicted of such offence, he or
 “ they shall have and receive fifty pounds for every offender,
 “ and shall be clearly acquitted and discharged of his her
 “ or their offence, and all other the like offences before
 “ committed for which no prosecution shall have been then
 “ commenced.”

(*a*) Vide the
 second section
 of the act re-
 cited. Bk. 1,
 c. 58. app. 7,
 sect. 2.

† *Secl. 37.* TENTHLY, As to taking money to help per-
 sons to stolen goods. By 6. Geo. 1. c. 23. f. 9. & 10.
 “ Whoever shall discover, apprehend, and prosecute to con-
 “ viction of felony without benefit of clergy, any person or
 “ persons for the said offence of taking money or other re-
 “ ward directly or indirectly to help any person to their
 “ stolen goods (such offender not having apprehended the
 “ felon who stole the same, and brought him or her to trial
 “ for the same, and given evidence against him or her as re-
 “ quired by law), shall be intitled to a reward of fifty pounds
 “ for every such offender so convicted as aforesaid, and shall
 “ have a like certificate, and like payments made without fee
 “ or reward, as any person may be intitled unto for appre-
 “ hending and convicting highwaymen.”

Reward for
 apprehending
 theft-booters,

By 25. Geo. 3.
 c. 57. whoever
 shall apprehend a coun-
 terfeiter of
 lottery tickets
 is intitled to
 a reward of
 50*l.* Vide Bk.
 1. p. 209.
 section 13.

† *Secl. 38.* And by 6. Geo. 1. c. 23. f. 8. “ All certificates
 “ signed upon conviction for robbery, shall be signed and
 “ paid without any deduction, fee, or reward, excepting any
 “ sum not exceeding five shillings for the writing and draw-
 “ ing thereof, upon pain of forfeiting the sum of forty pounds
 “ to the use of the person intitled to the certificate on the ac-
 “ count of which such fee or reward was taken as aforesaid.”

Certificates to
 be granted
 without fee.

CHAPTER THE THIRTEENTH.

OF

ARRESTS

BY

PUBLICK OFFICERS.

4. Comm. 286. **A**RRESTS of offenders by publick officers, are either by virtue of process from some court of record, or without such process.

Arrests of this kind by virtue of such process, shall be considered hereafter in their proper place.

Arrests by publick officers without such process, are either, 1. By watchmen. 2. By constables. 3. By bailiffs of towns; or, 4. By justices of peace.

Sec. 1. But before I consider the nature of each of these in particular, I shall take it for granted, that wherever any such arrest may be justified by a private person, in every such case *à fortiori* it may be justified by any such officer.

As to ARRESTS *by watchmen*, I shall first premise in what manner watch is to be kept in every town, and then shall shew the power of the watchmen.

Sec. 2. AND FIRST, As to the keeping watch in every town, it is enacted by the *statute of Winchester*, c. 4. "That from thenceforth all towns be kept as it had been used in times passed, that is, to wit, from the day of *Ascension* unto the day of *St. Michael*, in every city six men shall keep at every gate, in every borough twelve men, in every town six or four, according to the number of inhabitants of the town, and shall watch the town continually all night, from the sun-setting to the sun-rising."

Sec. 3. And it is farther enacted by 5. Hen. 4. c. 3. "That the watch to be made upon the sea-coasts through the realm, shall be made by the number of the people in the places, and in manner and form, as they were wont to be made in times past, and that in the same case the *statute of Winchester* be observed and kept; and that in the commissions

" commissions of the peace this article be put in, that the justices of peace have power thereof to make enquiry in their sessions from time to time, and to punish them which be found in default after the tenor of the said statute."

Seft. 4. It hath been resolved, that a stranger who is not an inhabitant of a town (a) cannot be compelled by virtue of the said *statute of Winchester* to keep watch in it. But it seems to be agreed, that every inhabitant is bound to keep it in his turn, or to (b) find another sufficient person to keep it for him; from whence it follows, that he is indictable for a refusal: But it is (c) not agreed, that he may be committed by the constable till he consent to do his duty.

(a) C. Eliz. 204.

(b) Vide Coke Littleton 70.

(c) C. Eliz. 204.

Seft. 5. As to the power of watchmen, it is farther enacted by the said *statute of Winchester*, c. 4. " That if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff (1), and the sheriff may receive him without damage, and shall keep him safely until he be acquitted in due manner. And if they will not obey the arrest, they shall levy hue and cry upon them, and such as keep the town shall follow with hue and cry with all the town and the towns near, and so hue and cry shall be made from town to town, until that they be taken, and delivered to the sheriff as before is said: And for the arrestments of such strangers none shall be punished."

2. Hale 96. 98.

(1) That is, to the common gaol.

Seft. 6. It is holden, that this statute was made in affirmation of the common law, and that every private person may by the common law arrest any suspicious *night-walker*, and detain him till he give a good account of himself, as hath been more fully shewn in the precedent chapter, section twenty.

Popham 208.
Latch. 173.
2. Hale 97.
Dalton 104.
4. Comm. 289.
Comb. 243.
By 5. Ann.

c. 31. if a watchman be killed in apprehending a burglar, his representatives are intitled to 40l.

As to such ARRESTS by *constables*, I shall endeavour to shew, How far they may be justified by their own authority; and, How far by virtue of a warrant from a justice of peace.

AND FIRST, As to the justifying of such arrests by the constable's own authority.

Seft. 7. It seems difficult to find any case wherein a constable is impowered to arrest a man for a felony committed or attempted, in which a private person might not

Ante sect. 15.

(a) 3. Inf.
158.
Lamb. Constable, 12.
17. E. 4. 5. a. b.
3. H. 7. 1. a.
2. H. 7. 15. b.
(b) Summary
91. 112.
10. E. 4. 17. 6.
2. Hale 81.
Douglas 360.

as well be justified in doing it: But the chief difference between the power and duty of a constable and a private person, in respect of such arrests, seems to be this, that the (a) former has the greater authority to demand the assistance of others, and is liable to the severer fine for any neglect of this kind, and has no sure way to discharge himself of the arrest of any person apprehended by him for felony, (b) without bringing him before a justice of peace in order to be examined, as shall be more fully shewn in the sixteenth chapter; whereas a private person, having made such an arrest, needs only to deliver his prisoner into the hands of the constable.

(c) Ch. 63.
sect. 14. 17.

(d) 2. 1. c. 63.
sect. 11, 12.

Sett. 8. But it is said, that a constable hath authority not only to arrest those whom he shall see actually engaged in an affray, but also to detain them till they find sureties of the peace, as hath been more fully shewn in the (c) First Book; whereas a private person seems to have no other power in a bare affray, not attended with the danger of life, but only to stay the (d) affrayers till the heat be over, and then deliver them to the constable, and also to stop those whom he shall see coming to join either party: But it is difficult to find any instance wherein a constable hath any greater power than a private person over a breach of the peace out of his view; and it seems clear, that he cannot justify an arrest for any such offence, without a warrant from a justice of peace, &c.

SECONDLY, As to the justifying such arrests by constables, by virtue of a warrant from a justice of peace.

(e) Dyer 244.
Fitz. Bar. 248.
Crompt. 149.
2. Keble 705.
Dalton c. 117.
(f) Crom. 148.
2. Keble 206.
Dalton c. 117.
13. E. 4. 9. a.

Sett. 9. It seems (e) clear, that such an arrest unlawfully made by a constable without a warrant, cannot be made good by a warrant taken out afterwards. Also it hath been (f) holden, that if a constable, after he hath arrested the party by force of any such warrant, suffer him to go at large, upon his promise to come again at such a time and find sureties, he cannot afterwards arrest him by force of the same warrant. However, if the party return and put himself again under the custody of the constable, it seems, that it may be probably argued, that the constable may lawfully detain him, and bring him before the justice in pursuance of the warrant; for if a person taken by virtue of a civil process, and voluntarily suffered by the sheriff to escape, may afterwards upon his return to the prison be kept by the sheriff by virtue of the same process, unless the plaintiff rather chuse to take advantage of the escape against the sheriff; surely *à fortiori* upon an arrest for a crime, in which case it is to be presumed that the public good requires that the party

party be brought to justice, it shall likewise be lawful to detain a person returning to the officer after such an escape: However, as the law seems (a) not to be settled in relation to such an escape after an arrest by virtue of a civil process; so neither doth it seem to be clear in relation to an escape after an arrest by force of such a warrant from a justice of peace.

(a) 1. Dan. Abr. 633. 633.
Hobart 202.
1. Levinz 211.
C. Car. 75.
2. Keble 206.

SECT. 10. But it seems clear, that a constable cannot justify any arrest by (b) force of a warrant from a justice of peace, which expressly appears in the face of it to be for an offence whereof a justice of peace hath no jurisdiction, or to bring the (c) party before him at a place out of the county for which he is a justice.—But it seems, that he both may and ought to execute a *general warrant* to bring a person before a justice of peace, to answer such matters as shall be objected against him on the part of the king, for that the officer ought to presume that the justice hath a jurisdiction of the matter which he takes (d) cognisance of, unless the contrary appear; and it may often endanger the escape of the party to make known the crime he is accused of.

(b) 14. H. 8. 16.
Crompt. 147.
148. 0
(c) Crompt. 149.
Strange 1002.
4. Comm. 288.
(d) Dalton c. 117.
1. Hale 577.
2. Hale 111.
Crom. 147.
148.
4. Burr. 1763.
Cro. Jac. 81.

But it seems to be very questionable, whether a constable can justify the execution of a *general warrant* to search for felons, or stolen goods; because such warrant seems to be illegal in the very face of it, for that it would be extremely hard to leave it to the discretion of a common officer to arrest what persons, and search what houses he thinks fit: And if a justice cannot legally grant a *blank warrant* for the arrest of a single person, leaving it to the party to fill it up, surely he cannot grant such a *general warrant*, which might have the effect of an hundred *blank warrants* (2).

Summary 93.
3. Inst. 177.
4. Comm. 288.
10. St. Tr. 426.
Yet see a precedent of this kind, Dalton 114.

SECT.

(2) Mich. Term 1763, Wilkes v. Wood, in trespass for assisting the King's messengers to enter and ransack the house of the plaintiff, by virtue of a *general warrant* from the secretary of state, LORD CAMDEN, in his charge to the jury, appears to have explicitly avowed his opinion of the illegality of general warrants. The plaintiff obtained a verdict; but whether any measures were taken to elude the effect of it, is not reported. Loft 18. 11. State Trials 323.—In Easter 1764, the same learned judge confessed a *bill of exceptions* which had been filed against his opinion, in the case of Money v. Leach; and upon the argument in Mich. Term, 1765, LORD MANSFIELD and the whole Court declared that general warrants to seize the person, unless in the cases specially authorised by acts of parliament, are illegal and void; that the magistrate alone should exercise his discretion, and give certain directions in the warrant to the officer; that the few instances in which they had been issued, arose from the practice of a particular office, not authorised by general usage; and that even antiquity itself could not sanctify a usage which was fundamentally bad. 1. Black. 562. 3. Burr. 1692. 1742. 11. State Trials 307. 321. But this cause went off upon another ground, and no decision was pointedly made upon the question. 11. State Trials 312. On 22d April 1766, however, the House of Commons passed a Resolution condemning general warrants, in the case of libels; and lest this limitation should impliedly authorise the use of them upon other occasions, the House, three days afterwards, passed another

vote,

vote, by which they were declared to be *universally* illegal. Subsequent to these Resolutions, Mr. Wilkes commenced an action against the earl of Halifax; who had issued a warrant to seize the "*authors*" of a periodical paper called the North Briton; No. 45; and upon which Mr. Wilkes had been apprehended and confined: He obtained a verdict with considerable damages; and since that event the courts of law have been silent upon this important subject. 11. State Trials 323.

Dalton c. 117.

Crompton

147, 148.

Dalton c. 118.

14. H. 8. 16.

See c. 12. f. 15.

Cont. 4. Inst.

177.

Sum. 93, 94.

Skinner 568.

Strange 1002.

(a) Dalton says this power is derived to the justices by virtue of the first *affignavimus* in their commission, and by force 5. Edw. 3. c. 14. Dalton 118. 121. 4. Inst. 576. 6. Modern 179. Cro. Eliz. 130. 1. Leon. 187. (b) 4. Inst. 177. 14. H. 8. 16. (c) 6. Mod. 179. (d) 14. H. 8. 16. 1. Hale 149. B. Faux Imprif. 33.

Vid. 2. Hale

159.

Ante sect. 15.

(e) 2. H. 7. 3.

15.

1. Hale 579.

583.

2. Hale 79.

107. 110.

4. H. 7. 2. a.

5. b. 9. E. 4

26. b. 10. E. 4.

17. b. 11. E. 4.

4. b. 13. E. 4.

9. a. 17. E. 4.

5. 5. Dyer 236.

Sec. 11. Yet perhaps it is the better opinion at this day, that any constable, or even private person, to whom a warrant shall be directed from a justice of peace to arrest a particular person for felony, or any other misdemeanor *within his jurisdiction*, may lawfully execute it, whether the person mentioned in it be in truth guilty or innocent, and whether he were before indicted of the same offence or not, and whether any felony were in truth committed or not. For however the justice himself may be punishable for granting such a warrant without sufficient grounds, it is reasonable that he alone should be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceeding; and therefore it seems that the old books (cited in the foregoing chapter, sect. 15, 16.) which say generally, that no one can justify an arrest upon a suspicion of felony, unless he himself suspect the party, and unless the felony were in truth committed, ought to be intended only of arrests made by a person of his own head, or in obedience to the command of a constable, or other such like ministerial officer, and not of such as are made in pursuance of the warrant of a justice of peace. For inasmuch as it seems to have been the constant and allowed practice of late, (a) to make out warrants on the suspicion of felony, before any indictment hath been found against the person suspected; and the same seems to be countenanced by 1. & 2. Ph. and Mary, c. 13. and 2. & 3. Ph. and Mary, c. 10. which direct in what manner persons brought before justices of peace upon suspicion, shall be examined in order to their being committed or bailed; and since the ancient (b) opinion, that a justice of peace cannot make out a warrant against a man for felony who has not been indicted before, hath been (c) contradicted by constant experience; and since in the very same (d) report in which this rule is laid down, that a justice of peace cannot make a warrant against a person who has not been indicted, it seems nevertheless to be agreed, that such a warrant is a good justification for the officer; and since none of the (e) books cited by Sir Edward Coke to maintain the contrary opinion, mention the case of an arrest by force of a warrant from a justice of peace but generally relate only to arrests by private persons of their own authority, or by the command of a constable; and since too,

the

the (a) case, which is fullest to the purpose, wherein it is resolved, that an arrest of a person by the command of a bishop for saying, that he was not bound to pay tithes, could not be justified by force of the (b) statute which authorised bishops to arrest persons for heresy; for which this reason is given among others, that the bishop himself could not justify such an arrest, and consequently could not authorise another to make it; it may be answered, that the resolution in that case doth not wholly depend upon this reason, but rather perhaps upon these, that the bishop's command was by word only, and not by writing, and that the statute gave him no jurisdiction over points not heretical; and that the power of imprisoning persons for mere matters of opinion ought to be strictly construed.

(a) 10. H. 7.
17.

(b) 2. H. 4. c.
15.

And farther, since the person injured by an arrest on a justice's warrant hath a good action against the justice who granted it, if he did it maliciously of his own head, in order to oppress or defame the party without any probable ground of suspicion, there is no necessity of giving a farther remedy against the officer who obeys the warrant.

Cro. Eliz. 130.
1. Leonard
187.
Vide 24. Geo.
2. c. 44.

And farther, since it is in general a great discouragement to officers, to subject them to actions for endeavouring to serve the publick, by paying obedience to the precepts of those whole officers they are; it would certainly be very difficult at this day to maintain an action against them for any arrest of this kind, unless the warrant appear to be for a matter whereof the justice has no jurisdiction (3).

(3) A warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction) will, by 24. Geo. 2. c. 44. at all events indemnify the officer who executes it ministerially. 4. Comm. 288.

It seems indeed to be holden in *Broucher's case* in *Croke's* C. Jac. 81. second report, that where an officer arrests a man by force of a warrant from a magistrate, *pro certis causis*, without shewing any cause in particular (4), he cannot justify himself in an action brought against him for such arrest, without setting forth the particular cause in his plea, and yet in this very report it seems to be allowed, that such a *general warrant* is good; and if so, it seems strange, that the officer should not be justified by setting forth the truth of his case (5); since if there were no good cause to justify the

(4) A warrant to apprehend *all persons* guilty of a crime therein specified, will not justify the officer who acts under it. 4. Comm. 288.

(5) If a ground of justification be found in a special verdict, the defendant has no right to avail himself of that finding, unless such ground is avowed in the plea. Lord CAMDEN. 11. St. Tr. 321.

granting of the warrant, the magistrate ought to answer for it, not the officer.

THIRDLY, As to such arrests by bailiffs of towns.

Stat. 12. It is enacted by the abovementioned *statute of Winchester*, c. 4. That in great towns, being walled, the gates shall be closed from the sun-setting until the sun-rising, and that no man do lodge in the suburbs, nor in any place out of the town, from nine of the clock until day, without his host will answer for him: And the bailiffs of towns every week, or at the least every fifteenth day, shall make inquiry of all persons being lodged in the suburbs, or in foreign places of the towns; and if they do find any that have lodged or received any strangers or suspicious persons against the peace, the bailiffs shall do right therein." And surely it cannot be doubted, but that by force hereof such bailiffs may lawfully arrest and detain any such stranger, being found under probable circumstances of suspicion, till he shall give a good account of himself.

FOURTHLY, As to such arrests by justices of peace.

Stat. 13. I shall first take it for granted, that wherever an arrest of this kind by a private person, or inferior officer acting of their own authority, is either permitted or enjoined by the law, in every such case, *a fortiori*, such an arrest by a justice of peace in person, is also permitted or enjoined.

ARRESTS by the command of justices of peace, as such, are either, *By parol*; or, *By warrant*.

AND FIRST, As to such arrests by parol.

Stat. 14. It seems, that any such justice may lawfully, by word of mouth, authorize any one to arrest another, who shall be guilty of any actual breach of the peace in his presence, or shall be engaged in a riot in his absence, as hath been more fully shewn in the first book, chapter 65. section 16.

As to such arrests by the warrant of a justice of peace, I shall endeavour to shew, In what cases a warrant for such an arrest may lawfully be made by such a justice; In what form it ought to be made; and, How it is to be executed.

As to THE FIRST POINT, I shall consider,

1. For what offences such a warrant may be granted.
2. Upon what evidence.

AND FIRST, As to the offences for which a warrant may be granted by a justice of peace.

SECT. 15. There seems to be no doubt, but that it may be lawfully granted by any justice of peace for treason, felony, or *præmunire*, or any other offence against the peace, as hath been more fully shewn in the chapter concerning Justices of Peace. Sup. c. 8. sect. 33, 34.

Also it seems clear, that wherever a statute gives to any one justice of peace a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do the thing ordained by such statute; for it cannot but be intended, that a statute giving a person jurisdiction over an offence, doth mean also to give him the power incident to all courts, of compelling the party to come before him. And it would be to little purpose to authorise a man to require another to do a thing, if it were to be understood that the person authorised had no power to compel the party to come before him. Dalton c. 117.
12. Co. 130,
131.
4. Com. n. 287.

SECT. 16. But it seems, that anciently no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor, cognisable only by a sessions of two or more justices; for that one single justice of peace hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it. Yet the long, constant, universal, and uncontrolled practice of justices of peace seems to have altered the law in this particular, and to have given them an authority in relation to such arrests, not now to be disputed. Dalton c. 117.
B. Peace, 6.

6. Modern
179.

SECT. 17. But I do not find any good authority, that a justice can justify sending a *general warrant* to search all suspected Summary 39.
10. St. Tr.
428.
11. St. Tr.
307. 326.

pested houses in general for stolen goods (6), as hath been more fully shewn in the tenth section.

(6) In November 1762, the earl of Halifax, secretary of state, issued a warrant "to search for John Entick the author, or one concerned in writing the *Monitor*." The messengers seized Mr. Entick and his papers. On trespass, the juror found a special verdict, and in Mich. 6. Geo. 3. Lord CAMDEN delivered the judgment of the court, That a warrant to seize and carry away *papers* in the case of a seditious libel is illegal and void.—His Lordship said, that warrants to search for stolen goods had crept into the law by imperceptible practice, that it is the only case of the kind to be met with, and that the law proceeds in it with great caution. For 1st, There must be a full charge upon oath of a theft committed. 2dly, The owner must swear that the goods are lodged in such a place. 3dly, He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description. And lastly, the owner must abide the event at his peril; for if the goods are not found, *he* is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him. 11. State Trials 321. Vide also 2. Hale 113. 151.

SECONDLY, As to the evidence on which such a warrant is to be granted.

- 2. Hale 108,
109.
- 6. Mod. 379.
- Qu. Dakt. 117.
- Con. 14. H.8.
- 16.
- 4. Comm. 287.

SECT. 18. It seems probable, that the practice of justices of peace in relation to this matter also, is now become a law, and that any justice of peace may justify the granting of a warrant for the arrest of any person upon strong grounds of suspicion for a felony or other misdemeanor, before any indictment hath been found against him. Yet inasmuch as justices of peace claim this power rather by connivance than any express warrant of law, and since the undue execution of it may prove so highly prejudicial to the reputation as well as liberty of the party, a justice of peace cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the king, but also of the party grieved, if he grant any such warrant groundlessly and maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty.

- Cro. Eliz. 130.
- 1. Leonard 18.
- 1. Black. 562.
- And see the
case of Led-
wick v. Catch-
pole, Caldecot's Cases 291.

- 4. Inst. 177.
- Summary 93.
- Sup. sect. 10.
- c. 12. sect. 15.

SECT. 19. And since both *Coke* and *Hale* seem to disapprove of such warrants granted upon suspicion, and the old books seem generally to disallow all arrest for the suspicion of felony made by any other person whatsoever except the very person who hath the suspicion, it is certainly a safe way of proceeding for him who hath the suspicion, to make the arrest in his proper person, and to get a warrant from a justice of peace to the constable to keep the peace.

SECT. 20. And perhaps there may be this difference between the warrant of a justice of peace for such causes which he has not authority to hear and determine as judge without the concurrence of others, and such warrant for an offence

offence which he may so determine without the concurrence of any other, that in the former case, inasmuch as he rather proceeds ministerially than judicially, if he act corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the king: But in the latter case he is punishable only at the suit of the king, for that regularly no man is liable to an action for what he doth as judge.

C. Eli. 130.
1. Leonard
187.

1. D. Abr. 179.
Carthew 492.

As to THE SECOND POINT, *viz.* In what form such a warrant is to be made; I shall lay down the following rules:

SECT. 21. FIRST, That (*a*) it ought to be under the hand and seal of the justice who makes it out.

(*a*) 1. Hale
577.

SECT. 22. SECONDLY, That it (*b*) ought to set forth the year and day wherein it is made, that, in an action brought upon an arrest made by virtue of it, it may appear to have been prior to such arrest.

2. Hale 111.
Dalt. c. 117.
3. Inst. 76.
14. H. 8. 16.
(*b*) Dalton c.
117. 121.

SECT. 23. THIRDLY, That it is (*c*) safe, but perhaps not necessary, in the body of the warrant to shew the place where it was made; yet it seems necessary to set forth the county in the margin, at least, if it be not set forth in the body.

(*c*) Dalton c.
117. 121.
Lamb. 85, 86.
Crompton
147. 232, &c.

SECT. 24. FOURTHLY, That it may be made either in the name of the king, or of the justice himself, as appears from the precedents above referred to.

4. Burn 383.

SECT. 25. FIFTHLY, (*d*) That if it be for the peace or good behaviour, it is advisable to set forth the special cause upon which it is granted; but if it be for treason or felony, or other offence of an enormous nature, it is said, that it is not necessary to set it forth; and it seems to be rather discretionary than necessary to set it forth in any case.

(*d*) Dalt. c.
117.
Sup. Sect. 10.
2. Hale 117.

SECT. 26. SIXTHLY, (*e*) That such a warrant may be either general, to bring the party before any justice of peace of the county; or special, to bring him before the justice only who granted it.

(*e*) Dalt. c.
117.
1. Roll 375.
5. Coke 59.
B. Peace 9.

SECT. 27. SEVENTHLY, (*f*) That it may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer; for that the justice may authorize any one to be his officer, whom he pleases to make such; yet it is most advisable to direct it to the constable of the precinct wherein it is to be executed (*g*) for that no other constable, and *a fortiori* no private person, is compellable to serve it.

(*f*) Dalt. c.
117.
Crompt. 147.
14. H. 8. 16.
B. Peace 6.
Salk. 176. 381.
Ld. Ray. 1192.
(*g*) Salk. 176.
1. Hale 582.
2. Hale 110.

As to THE THIRD POINT, viz. In what manner such warrant is to be executed, I shall lay down the following rules.

8. E. 4. 14.
14. H. 7. 9.
6. Coke 41.
9. Coke 69.
1. Hale 583.
2. Hale 116.

Vide also 24.
Geo. 2. c. 44.

Sec. 28. FIRST, That a bailiff, or a constable, if they be sworn and commonly known to be officers, and act within their own precincts, need not shew their warrant to the party, notwithstanding he demand the sight of it; but that these and all other persons whatsoever making an arrest, ought to acquaint the party with the substance of their warrants, and that all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known, and even these, if they act out of their own precincts, must shew their warrants, if demanded, † And therefore it is enacted by 27. Geo. 2. c. 20. that in all cases where any justice of the peace is required or empowered by any statute to issue a warrant of distress for the levying any penalty inflicted, or sum of money thereby directed to be paid, "the officer executing such warrant, " if required, shall shew the same to the person whose goods " and chattels are distrained, and shall suffer a copy thereof " to be taken."

- Dalton c. 117.
8. E. 4. 14.

Sec. 29. SECONDLY, That the sheriff having such warrant directed to him, may authorise others to execute it; but that every other person to whom it is directed, must personally execute it; yet it seems, that any one may lawfully assist him.

- Carthew 508.
Salkeld 176.
1. Hale 581.
2. Hale 110.
LdRaym. 546.
4. Comm. 208.

Sec. 30. THIRDLY, That if a warrant be generally directed to all constables, no one can execute it out of his own precinct; but if it be directed to a particular constable by name, he may execute it any where within the jurisdiction of the justice.

- (a) A case in Middlesex before Lord Mansfield; and Dawson or Lawson v. Clarke by the same learned judge at Norwich Summer assizes, 1761. (b) Money v. Leach, Trin. 8, November 1765. 11. State Trials 312.

† *Sec. 31.* FOURTHLY, That the execution of a warrant must be pursuant to the directions of it. Therefore, where a warrant was directed to the officer, "to take up a disorderly woman, and he took up a woman who was not so," the arrest was held to be illegal, and the officer liable to an action for the injury (a).—So also where a warrant was directed by a secretary of state to the king's messengers, "to take up the author, printer, or publisher of a libel," and the messengers took up a person who was neither author, printer, nor publisher, it was determined to be unjustifiable, and the messengers liable to an action of trespass and false imprisonment (b), for in neither of the cases had the officers acted in obedience to their warrants.

CHAPTER THE FOURTEENTH.

WHERE DOORS MAY BE BROKEN OPEN IN ORDER TO
MAKE AN ARREST.

AND now I am to consider in what cases it is lawful to break open doors, in order to apprehend offenders.

And to this purpose I shall premise, that the law doth never allow of such (a) extremities but in cases of necessity; and therefore, that no one can justify the breaking open another's doors to make an arrest, unless he first signify (1) to those in the house the cause of his coming, and request them to give him admittance.

(a) 27. Aff. 35.
4. Inst. 177.
5. Co. 91. 92.
Dalton c. 78,
2. Hale 103.
116, 117.
Summary 90.* F. Exccu. 25. 2. Foster 320

(1) No precise form of words is required to be used in giving notice. It is sufficient if the party is made acquainted that the officer does not come as a mere trespasser, but claims to act under a proper authority, provided the officer had in fact a legal warrant. Foster 137.

SECT. 2. But where a person authorised to arrest another who is sheltered in a house, is denied quietly to enter into it, in order to take him, it seems generally to be agreed, that he may justify breaking open the doors in the following instances.

SECT. 3. FIRST, Upon a (b) *capias* grounded on an indictment for any crime whatsoever: or upon a (c) *capias* from the (d) king's bench or chancery, to compel a man to find sureties for the peace or good behaviour: or even upon a warrant from a justice of peace for such purpose.

(b) 27. Aff. 35.
12. Co. 131.
4. Inst. 131.
(c) Moor 606.
668.
(d) Dalton c. 78. Crompton 170. Foster 136.

SECT. 4. SECONDLY, Upon a (e) *capias utlagatum*, or (e) *capias pro fine*, in any action whatsoever.

(e) Moor 606.
658.
C. Eli. 908.
Yelverton 28. Dalton c. 78.

SECT. 5. THIRDLY, Upon the (f) warrant of a justice of peace, for the levying of a forfeiture in execution of a judgment or conviction for it grounded on any statute which gives the whole, or but part of such forfeiture to the king, and authorises the justice of peace to give such judgment or conviction for it.

(f) 2. Jones 233, 234.
But in this case the officer must shew the warrant if required. Vide c. 13. sect. 28.

(a) Dalt. c. 22. and 78. *SECT. 6. FOURTHLY*, Where a (a) forcible entry or detainer is either found by inquisition before justices of peace, or appears upon their view.

(b) Summary 90. 93. 1. Hale 588, 589. Dalton c. 78. 13. E. 4. 9. (c) 13. E. 3. 7. (d) Summ. 91. 4. Inst. c. 117. 321. Vide 1. Hale 583. contra. *SECT. 7. FIFTHLY*, (b) Where one known to have committed a treason or felony, or to (c) have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person. But where one lies under a probable suspicion only, and is not indicted, it seems the better (d) opinion at this day, that no one can justify the breaking open doors in order to apprehend him. Con. 13. E. 4. 9. B. Cor. 119. Dalt. c. 78. F. Barr. 110. Foster 320.

(e) Sum. 134. 2. Hale 95. Comp. 170. Dalton c. 78. B. F. Imprison. 6. *SECT. 8. SIXTHLY*, Where an (e) affray is made in a house in the view or hearing of a constable; or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter, in order to suppress the affray in the first case, or to apprehend the affrayers in either case.

(f) 6. Mod. 173, 174, 211. Skinner 8. Salkeld 79. 1. Hale 459. *SECT. 9. SEVENTHLY*, Wherever a (f) person is lawfully arrested, for any cause, and afterwards escapes, and shelters him in a house. 2. Roll 138. Ld. Raym. 1028. Foster 320.

SECT. 10. Also it is enacted by 3. & 4. Jac. 1. c. 35. "That upon any lawful writ, warrant, or process awarded to any sheriff or other officer, for the taking of any popish recusant, standing excommunicated for such recusancy, it shall be lawful, if need be, to break open any house."

SECT. 11. But it hath been resolved, that where justices of peace are, by virtue of a statute, authorised to require persons to come before them, to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors of the persons who shall be named in any warrant made in pursuance of such statute, in order to be brought before the justices to take such oath, because such warrant is not grounded on a precedent offence; neither doth it appear, that the party either is or will be guilty of any: But it seems clear, that if an officer enter into any house to serve any such warrant, and the doors of the house be locked upon him, being in such house, he or his friends may justify breaking them open, in order to regain his liberty; for that even in the execution of civil process, the law allows of the breaking open doors in the like circumstances.

Palm. 52, 53.
Cro. Jac. 555.
Foster 319.

CHAPTER THE FIFTEENTH.

OF B A I L.

AND now I am to consider in what manner, and in what cases, offenders are to be bailed.

As to which it is to be observed, that wherever a person is brought before a justice of peace upon an accusation of treason or felony, he must be either bailed or committed, unless it manifestly appear that no such crime was committed, or that the cause for which alone the party was suspected, was totally groundless; in which cases *only* it is lawful to discharge him without bail. Summary 98, Crompt. 554, 2. Hale 120, 121.

For the better understanding of the nature of bail, I shall consider the following points.

1. The nature of bail and mainprize in general.
2. What shall be said to be sufficient bail.
3. The offence of taking insufficient bail.
4. The offence of granting it where it ought to be denied.
5. The offence of denying, delaying, or obstructing it where it ought to be granted.
6. In what cases it is grantable.
7. In what form it is to be taken.
8. What shall forfeit the recognifance.

AND FIRST, As to the nature of bail and mainprize in general, I shall endeavour to shew, *First*, In what respects they agree; and, *Secondly*, In what they differ.

Secd. 2. As to the *first* particular it seems, that the words "bail" and "mainprize" are often used promiscuously in our (a) law-books and (b) acts of parliament, as signifying one and the same thing. And it is (c) certain, that *bail* and *mainprize* agree in this notion, that they save a man from imprisonment in the common gaol, by his friends under-
(a) 1. Hale 124. Dalton c. 114. Lambard 340. 4. Inst. 180. (b) 1. Rich. 3. 3. H. 7. 3. 1. & 2. Ph. & Mar. 13. (c) Summary 96. Dalton c. 114.

taking

taking for him before certain persons for that purpose authorised, that he shall appear at a certain day, and answer the crime with which he is charged, and be justified by law.

Sett. 3. As to the *second* particular, the chief, if not the (a) only difference between *bail* and *mainprize* seems to be this, that a man's *mainpernors* are (b) *barly* his sureties, and cannot justify the detaining or imprisoning of him themselves, in order to secure his appearance; but that a man's *bail* are looked upon as his (c) *gablers* of his own choosing, and that the (d) person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper gaoler. But I do not find this point clearly settled in relation to any other court besides the king's bench, as hath been more fully shewn chapter 5. section 4. However it seems certain, in every bailment, that if the party bailed be (e) suspected by his bail as likely to deceive them, he may be detained by them, and enforced to appear according to the condition of the recognisance, or may be (f) brought by them before the justice of peace, by whom he shall be committed, unless he find new sureties.

(a) 4. Inft. 179. 180.
(b) F. Mainp. 12. 13.
B. Mainp. 89.
Coke, B. & Mainp. c. 3. and the books cited under letters f. g. h.
Con. 4.
H. 6. 8. pl. 21.
32. H. 6. 4. pl. 3.
(c) 1. Hale 324.
2. Hale 35.
124. 125.
Summary 98.
F. Mainp. 12.
13.
(d) S. P. C. 64. 21. H. 7. 37. pl. 26. 22. U. 6. 59. pl. 13. 39. H. 6. 27. pl. 39.
32. H. 6. 4. pl. 3. Sup. c. 6. sect. 4. (e) F. Mainp. 12. 13. Dalton c. 114.
B. Mainp. 99. 6. Modern 231. 247. 2. Hale 127. (f) Summary 96. Dalton c. 114.

As to THE SECOND POINT, *viz.* What shall be said to be sufficient bail.

(g) 2. Hale 121. Summary 97. Dalton c. 114. 10. Coke 101.
(h) Sty. Reg. 110.
2. Str. 854.
(i) Dalton c. 70. & 114.
Summary 97.
(k) Dalton c. 114. Summary 97.

Sett. 4. It seems to be (g) agreed, that no person ought in any case to be bailed for felony by less than *two* sureties; and it is (h) said to be the practice of the king's bench, not to admit any person to bail upon a *habeas corpus* on a commitment for treason or felony without *four* sureties (i). Also (i) it seems to have been antiently an established rule, that none under the degree of subsidy-men should be admitted to bail any person for a capital crime: But the manner of granting taxes by way of subsidy having been of late for many years disused, this rule at present seems to be of little use. But the only sure way of proceeding in this case, is to take care that every one of the bail be of ability sufficient to answer the sum in which they are bound, which (k)

(l) In felony four persons are required for bail; but for any inferior offence two are sufficient. In both cases the number of the bail must be mentioned in the notice, otherwise the Court will reject the whole. Lord Mansfield, *Rex v. Belton*, Mich. 23. Geo. 3. MS.

ought never to be less than *forty pounds* for a capital crime, but may be as much higher as the justices in discretion shall think fit to require, upon consideration of the ability and quality of the prisoner, and the nature of the offence. And if it shall seem doubtful, whether the persons who offer themselves to be sureties, be able to answer such sum, it is (a) said, that the person who is to take the bail, may examine them on their oaths concerning their sufficiency: And if a person who has power to take bail be so far imposed upon as to suffer a prisoner to be bailed by insufficient persons, it is said, that either he, or any other person who hath power to bail him, may require the party to find better sureties, and to enter into a new recognisance with them, and may commit him on his refusal, for that insufficient sureties are as no sureties.

(a) Dalt. c.

114.

Crom. 194.

2. Hale 125.

Summary, 96.

Dalt. c. 70. &

114.

Señ. 5. But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of bail; for this is looked on as a great grievance, and is complained of as such by 1. Will. and Mary, *señ. 2.* by which it is declared, “ that excessive bail ought not to be required.”

As to THE THIRD POINT, *viz.* The offence of taking insufficient bail.

Señ. 6. It seems clear, that wherever a sheriff, in pursuance of the *statute of Westminster*, c. 15. or justices of peace in pursuance of the subsequent statutes, grounded on the said *statute of Westminster the first*, and set forth more at large in the following part of this chapter, shall admit any person to bail for felony, with insufficient sureties, who shall not afterwards appear according to the condition of the recognisance, the justices of assize may, by force of 27. Edw. 1. c. 3. commonly called the *statute de finibus levatis*, impose such fine on such sheriff or justices of peace, as to such justices of assize in their discretion shall seem proper. But if a prisoner, who is bailed by insufficient sureties, do appear according to the condition of the recognisance, it seems that those who admitted him to bail are safe, inasmuch as the end of the law is answered, and the appearance of the prisoner as effectually procured by such sureties, as if they had been never so sufficient.

Vide sup. c. 6.

señ 10, 11. &c.

Dalton c. 114.

Summary 97.

As

As to THE FOURTH POINT, viz. The offence of granting bail where it ought to be denied.

S. P. C. 33. 77. *Sett.* 7. There is no doubt but that the bailing of a person who is not bailable by law, is punishable either at common law, as a negligent escape, as shall be more fully shewn in the chapter concerning Escapes, or as an offence against the several statutes concerning bail.
25. E. 3. 39.
F. Escape 4.
F. Corone 246.
Summary 97.
113.
1. Hale 596, 597.

Sett. 8. And first it is enacted by the *statute of Westminster the first*, c. 15. " That if the sheriff, or any other, let any
" go at large by surety, that is not repleviable, if he be
" sheriff, or constable, or any other bailiff of fee which
" hath keeping of prisons, and be thereof attainted, he
" shall lose his fee and office for ever. And if the under-sheriff, constable, or bailiff of such as have fee for
" keeping of prisons, do it contrary to the will of his
" lord, or any other bailiff being not of fee, they shall
" have three years imprisonment, and make fine at the
" king's pleasure."

Vide sup. c. 6.
sect. 11, 12.
&c.

Sett. 9. Also it is enacted by 27. Edw. 1. commonly called the *statute de finibus levatis*, c. 3. " That the justices
" assigned to take assizes, &c. when they deliver the gaols,
" &c. shall inquire if sheriffs, or any other, have let out
" by replevin prisoners not repleviable, or have offended in
" any thing contrary to the form of the said *statute of Westminster the first*, and whom they shall find guilty they shall
" chasten and punish in all things, according to the form
" of the said statute."

Vide supra c.
6. sect. 13, 14.

Sett. 10. And it is farther enacted by 4. Edw. 3. c. 2.
" That at the time of the assignment of keepers of the
" peace, mention shall be made, that such as shall be indicted, or taken by them, shall not be left to mainprize
" by the sheriffs, nor by none other ministers, if they be
" not mainpernable by law; nor that none who are indicted shall be delivered but by the common law. And
" that the justices assigned to deliver the gaols, shall have
" power to inquire of sheriffs, gaolers and others, in
" whose ward such persons indicted shall be, if they
" make deliverance, or let to mainprize, any so indicted,
" which be not mainpernable; and to punish the said
" sheriffs, gaolers, and others, if they do any thing against
" the said act."

Sett. 11. And it is enacted by 1. & 2. Philip and Mary, c. 13. " That no justice or justices of peace shall let to
" bail or mainprize any person or persons, which for any
" offence

“ offence or offences, by them, or any of them committed,
 “ be ~~declined~~ not to be replevied or bailed, or be forbid-
 “ den to be replevied or bailed, by the above-mentioned
 “ *statute of Westminster the first*, c. 15. And that the justices
 “ of gaol delivery of the place where such justices of the
 “ peace shall be guilty of such offence, upon due proof
 “ thereof, by examination before them, shall for every such
 “ offence set such fine on every such justice, as the same jus-
 “ tices of gaol-delivery shall think meet, &c.”

Sect. 12. It hath been resolved, that it is no excuse for Popham 96.
 justices of peace, admitting a person to bail who was in Dalton c. 124.
 truth committed for a cause not bailable by law, that they
 did not know that he was committed for such cause, and
 that no other cause of his commitment was mentioned in
 his *mittimus* but the suspicion of felony; for that they ought,
 at their peril, to have informed themselves of the cause for 2. Strange
 which the party was committed, that they might be satisfied 1216.
 that he was bailable by law.

As to THE FIFTH POINT, *viz.* The offence of deny-
 ing, delaying, or obstructing bail, where it ought to be
 granted.

Sect. 13. This seems to be a misdemeanor, not only by the Vide 14. H.
 statute, but also by the common law, and punishable thereby 7. 7.
 as an offence against the liberty of the subject, not only by Summary 97.
 action at the suit of the party wrongfully imprisoned, but Dalt. c. 114.
 also by indictment at the suit of the king.

Sect. 14. But it seems clear, that he who has power to Summary 97.
 bail another is not bound to demand of him to find sureties, Dalt. c. 114.
 and to forbear committing him till he shall refuse to find 14. H. 7. 10.
 them; but may well justify his commitment, unless the party B. Peacc 7.
 himself shall offer his sureties. B. Mainp. 29.

Sect. 15. The principal statutes relating to this offence
 are the above-mentioned statute of *Westminster the first*, c.
 15. the statute *de finibus*, 27. Edw. 1. c. 3. and 31. Car. 2.
 c. 2. commonly called the HABEAS CORPUS ACT; by
 the first whereof it is enacted, “ That if any with-hold
 “ prisoners repleviable, after that they have offered sufficient
 “ surety, he shall pay a grievous amercement to the king.
 “ And if he take any reward for the deliverance of such,
 “ he shall pay double to the prisoner, and also shall be
 “ in the great mercy of the king.” And by the latter
 of the said statutes it is enacted, “ That justices of assize 3. Comm. 136.
 “ shall inquire if sheriffs, or any other, have offended in
 “ any thing contrary to the said statute of *Westminster*, and
 “ whom they shall find guilty they shall punish in all things
 “ according to the form of the said statute.”

Stat. 16. Also it is recited by the above-mentioned statute of 31. Car. 2. that great delays have been used by sheriffs, gaolers, and other officers, to whose custody the king's subjects had been committed for criminal, or supposed criminal matters, in making return of writs of *habeas corpus*, by standing out an *alins* and *pluries*, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty, and the known laws of the land, whereby many subjects have been long detained in prison, in such case where by law they were bailable, &c. And thereupon IT IS ENACTED, "That whensoever any person shall bring any *habeas corpus* directed unto any person whatsoever, for any person in his custody, and the said writ shall be served upon the said officer, or left at the gaol or prison with any of the under-officers, under-keepers, or deputy of the said officers or keepers, that the said officer or officers, his or their under-officers, under-keepers, or deputies, shall, within three days after such service thereof (unless the commitment were for treason or felony plainly and specially⁽²⁾ expressed in the warrant of commitment), upon payment or tender of the charges of bringing the said prisoner to be ascertained by the judge or court that awarded the same, and endorsed on the said writ, not exceeding *twelve pence* per mile, and on security given by his own bond, to pay the charges of carrying back the prisoner, if he should be remanded, and that he will not make any escape by the way, make return of such writ, and bring, or cause to be brought, the body of the party so committed, or restrained, unto or before the lord chancellor, or lord keeper, the judges or barons of the court from which the said writ shall issue, or such other persons before whom the said writ is made returnable, according to the command thereof; and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment be in a place beyond twenty miles distance, &c. and if beyond the distance of twenty, and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days."

(2) Not for treason or felony in general, but treason for counterfeiting the king's coin, or felony for stealing the goods of such a one to such an amount, and the like. Therefore if a constable, upon his own authority, carry an offender to gaol, which he may do by 4. Edw. 3. c. 10. without any warrant of commitment from a justice of peace, he would have a right to be bailed upon this act, whatever the offence may be. 1. Burn 151.—But in Lord Montgomery's case, 10. Mod. 334. it is said, that a commitment for treason generally is good.

N. B. The king's bench may bail though the *habeas corpus* act is suspended. Vide 8. Modern 93. Salkeld 103. 2. St. Tr. 396.

3. Comm. 136. *Stat.* 17. And by 31. Car. 2. c. 2. f. 3. it is farther enacted, "That all such writs shall be marked in this manner,"
"P.A."

" ~~per statutum tricesimo primo Caroli secundi, regis~~; and shall
 " be signed (1) by the person that awards the same. .
 not be obeyed, *Rex v. Roddam*, Cowper 672.

And by 31. Car. 2. c. 2. " If any person shall be, or
 " stand committed or detained as aforesaid, for any crime,
 " unless for treason or felony, plainly expressed in the war-
 " rant (2) of commitment, in the *vacation time*, it shall be
 " lawful for such person so committed or detained (other
 " than persons convicted, or in execution by legal process),
 " or any one on his behalf, to complain to the lord chan-
 " cellor, or lord keeper, or any justice of either bench, or
 " baron of the exchequer, of the degree of the coif; and the
 " said lord chancellor, &c. justice, or baron, on view of
 " the copy of the warrant of the commitment, or otherwise
 " on oath that it was denied, or authorized and required,
 " on request in writing by such person, or any in his behalf,
 " attested and subscribed by two witnesses (3), who were
 " present at the delivery of the same, to grant an *habeas cor-*
 " *pus* under the seal of the court whereof he shall be one of
 " the judges, to be directed to the officer in whose custody
 " the party shall be returnable *immediatè* before the said lord
 " chancellor, &c. justice or baron.

(2) 10. Mo-
 dern 429.
 Strange 142.
 308.
 2. Burrow
 765.

(3) One wit-
 nesses and an af-
 fidavit that the
 other is sick
 is sufficient,
 Comb. 6.

" And it is further enacted, that on service thereof as
 " aforesaid, the officer, &c. in whose custody the party is,
 " shall within the times respectively before limited, bring
 " him before the said lord chancellor, justice or baron be-
 " fore whom the said writ is returnable; and in case of his
 " absence, before any other of them, with the return of
 " such writ, and the true causes of the commitment and
 " detainer. (4)

(4) For the
 certainty re-
 quired in the
 return, vide.
 Douglas 159.
 Wilson 154.
 Andrews 281.

" And that thereupon within two days after the party
 " shall be brought before them, (5) the said lord chancel-
 " lor, justice or baron, before whom the prisoner shall be
 " brought as aforesaid, shall discharge the said prisoner from
 " his imprisonment, taking his recognizance, with one or
 " more sureties, in any sum according to their discretions,
 " having regard to the quality of the prisoner and nature of
 " the offence, for his appearance in the king's bench the
 " Term following, or in such other court wherein the of-
 " fence is properly cognizable, as the case shall require;
 " and then shall certify the said writ with the return there-
 " of, and the recognizance, into such court; unless it be
 " made appear to the said lord chancellor, &c. that the
 " party

(5) If a per-
 son is too in-
 firm to be
 brought into
 Court, the
 court will or-
 der the party
 to be attend-
 ed, &c. Vide
 2. Burrow
 1099.
 3. Burrow
 1363.

“ party so committed is detained upon a legal process, order, or warrant, out of some court that hath jurisdiction of criminal matters; or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences, for the which by law the prisoner is not bailable (6).”

(6) 2. Inst. 55. 2. Hale 143. Vaugh. 156. 3. Com. Dig. 458. i. Wilfon 154. 3. Wilfon. 188. Strange 444. 794. 982. Ld. Raym. 1354. Bur. 460. 606. 1991. 2115. 1434.

Sett. 18. But it is provided, par. 4. “ That if any person shall have wilfully neglected, by the space of two whole Terms after his imprisonment, to pray a *habeas corpus* for his enlargement, he shall not have a *habeas corpus* to be granted in vacation-time, in pursuance of this act.”

No privilege will excuse a peer from obeying the writ. 1. Burrow 613. Vide also Strange 187. 915. 339. Ld. Raym. 580. 603.

Sett. 19. And it is farther enacted, par. 5. “ That if any officer, &c. shall neglect or refuse to make the returns aforesaid, or to bring the body of the prisoner according to the command of the said writ, within the respective times aforesaid, or shall not, within six hours after demand, deliver a true copy of the commitment, &c. he shall forfeit for the first offence 100*l.* for the second 200*l.* and be made incapable to hold his office, &c.”

Sett. 20. And it is farther enacted, par. 6. “ That no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence by any person whatsoever, other than by the legal order and process of such court wherein he shall be bound by recognizance to appear, or other court having jurisdiction of the cause, on pain of 500*l.*”

Salkeld 103. Comber. 6. Lucas 429. 1. Show. 190. 3. Com. Dig. 453.

Sett. 21. And it is farther enacted, par 7. “ That if any person who shall be committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court, the first week of the Term, or the first day of the sessions of oyer and terminer, or general gaol-delivery, to be brought to his trial, shall not be indicted some time in the next Term, sessions of oyer and terminer, or general gaol-delivery after such commitment, the justices of the said court shall, upon motion in open court, the last day of the Term or sessions, set at liberty the prisoner upon bail; unless it appear upon oath, that the witnesses for the
“ king

king could not be produced the same Term, &c. And if
 “ such prisoner, upon his prayer, &c. shall not be indicted
 “ and tried the second Term, or sessions, he shall be dis-
 “ charged from his imprisonment.”

Señt. 22. And it is farther enacted, par. 10. “ That it
 “ shall be lawful for any prisoner, as aforesaid, to move
 “ and obtain his *habeas corpus*, as well out of the chancery
 “ or exchequer, as the king’s bench or common pleas :
 “ And if the said lord chancellor or lord keeper, or any
 “ judge or judges, baron or barons, for the time being, of
 “ the degree of the coif, of any of the courts aforesaid, in
 “ the vacation-time (7), upon view of the copy of a war-
 “ rant of commitment or detainer, or on oath made that
 “ such copy was denied, shall deny any writ of *habeas cor-
 “ pus*, by this act required to be granted, being moved for
 “ as aforesaid, they shall severally forfeit to the party
 “ grieved, the sum of five hundred pounds.”

(7) A notion prevailed, that all writs of *habeas corpus* granted in vacation expired on the commencement of the Term ; but Lord Mansfield, Hill. 31. Geo. 2. declared the unanimous opinion of the Court, that such notion was ill founded ; that a person might be brought into court upon a *habeas corpus* issued in vacation ; and that to require a new writ, would be attended with delay and expence without the least reason or utility. 1. Burrow 460. 542. 606. 608.

Señt. 23. But it is provided, par. 18. “ That after the
 “ affizes proclaimed for that county where the prisoner is
 “ detained, no person shall be removed from the common
 “ gaol upon any *habeas corpus* granted in pursuance of this
 “ act ; but upon such *habeas corpus* shall be brought before
 “ the judge of affize in open court, who thereupon shall do
 “ what to justice shall appertain.”

But it is provided nevertheless, par. 19. “ That after the
 “ affizes are ended, any person detained may have his *habeas
 “ corpus* according to the direction of this act.”

Señt. 24. It is observable, that this statute makes the
 judges liable to an action at the suit of the party grieved in
 one case only, which is the refusing to award a *habeas corpus*
 in vacation-time ; and seems to leave it to their discretion in
 all other cases, to pursue its directions in the same manner
 as they ought to execute all other laws, without making
 them subject to the action of the party, or to any other ex-
 press penalty or forfeiture : And this is most agreeable to the
 general reason of the law, which regularly will not suffer a
 judge to be liable to an action for what he does as judge.

4. Comm. 137.
 Burrow 856.
 1437.
 Rex v. Bevan
 B. R. Mich.
 Term, 1789.
 B. 1. c. 72.
 sect. 6. & B. 2.
 c. 1. sect. 17.

AS TO THE SIXTH POINT, *viz.* In what cases bail grantable, I shall endeavour to shew,

1. Where it is grantable by a sheriff.
2. Where by a justice of peace.
3. Where by justices of gaol-delivery.
4. Where by the courts of Westminster-Hall.

AS TO THE FIRST POINT, I shall consider, Where bail is grantable by a sheriff *ex officio*; and, Where by virtue of a writ.

(a) Dalif. 11. *Secf.* 25. As to the first particular, it is holden by (a) some, that, by the common law, the sheriff might, by virtue of his office as, principal conservator of the peace, bail any person arrested on suspicion of felony, or for any other offence which is bailable.
 Preamble to 13. Edw. 1. c. 15.
 Reg. 83. 169.
 S. P. C. 74.
 F. Corone 297.
 2. Inst. 190.

(b) Dalif. 11. *Secf.* 26. Also it hath been holden, (b) that a constable had the like power by the common law: And it may (c) probably be inferred from the recitals of the writs of mainprife in THE REGISTER, that, by the common law, the sheriff had power to bail persons indicted of larceny in a (d) court-leet, and also persons indicted as (d) accessaries to a felon, and persons appealed by (e) approvers, after the death of the approvers, &c. But it seems that the sheriff (f) had no power *ex officio*, to bail any person indicted of any crime before justices of peace. And it is certain, (g) that neither the sheriff nor constable could, in any of the cases above mentioned, take bail by *recognizance* but only by *obligation*. And some (h) have holden, that the statutes which empower justices of peace to admit persons to bail on an accusation of felony, and particularly prescribe in what manner they shall do it, have taken away all power of this kind from the sheriff and constable; yet others seem to be of another opinion, because the said statutes are wholly in the affirmative.

(i) Sum. 106. *Secf.* 27. But it seems certain, (i) that by the common law, the sheriff might bail any person who was indicted before him at his torn, for felony, or any other crime that is bailable; because he might both award process and also give judgment against the person so indicted: And it is a general (k) rule, that *whosoever is judge of the offence may bail the offender*. But it is holden, that at this day the sheriff has lost

- Hale 148.
 149.
 2. Inst. 190.
 Register 269.
 (k) Lamb. 342.
 348.
 S. P. C. 74.
 2. Inst. 190.

lest his power (8), by reason of 1. Edw. 4. c. 2. set forth (8) Vide more at large c. 10. f. 74. by which it is enacted, "that 6. Mod. 179. Strange 479. and the case of Bengough v. Roffiter, 4. Term Rep. 505.

"the sheriff shall not proceed on any such indictment, but
"shall remove it to the next sessions of peace."

Sec. 28. As to the second particular, it seems, that bail is grantable by a sheriff by virtue of the following writs, viz.
1. That of *odio et atia*. 2. That of *mainprise*; and, 3. That of *homine replegiando*.

But having already, in Book 1. c. 29. f. 20. & 24. incidentally shewn the nature of THE FIRST of these writs, which seem to be in great measure obsolete at this day, I shall refer the reader to what is there said concerning it.

Sec. 29. SECONDLY, Of the writ of *mainprise* little notice is taken in the late books; yet the law relating to it seems to be still in force in many cases; and consequently in such cases, those who areailable, and have been refused the benefit of bail, may still by virtue thereof be delivered out of prison (upon their finding sureties (a) to the sheriff that they will appear and answer to the crimes alledged against them, before the justices in the writ mentioned, &c.) as those (b) who are imprisoned for a slight suspicion of felony, or indicted of larceny (c) before the steward of a leet, or of trespass (d) before justices of peace, and many other (e) persons, all which it will be needless to enumerate.

(a) Reg. 269.
270.
(b) F. N. B. 250.
3. Comm. 128.
1. Hale 141.
Register 269.
Coke on Bail
and Mainprise, ch. 3. and 10. (c) F. N. B. 250. Register 269. 4. Inst. 179.
2. Inst. 297. (d) F. N. B. 250, 251. Register 133, 270, 271. (e) F. N. B. 250, 251. Register 269, &c.

Sec. 30. But as to that which is said in general, both by Sir Matthew Hale (f) and Sir Edward Coke, (g) in relation to this matter, from which it may seem to have been the opinion of those authors, that no writ of *mainprise* is grantable at this day, it may be answered, that this is to be understood (h) only of the writ of *mainprise* for persons indicted before the sheriff in his torn, in relation to whom he has no judicial power at this day, and consequently no power to bail them, *ex officio*; from whence it follows that the writ of *mainprise* for such persons, being grounded on a suggestion that the sheriff had unjustly refused before to admit them to bail, cannot now be proper, because he cannot be said to have unjustly refused to do a thing which he had no power to do. But this can be no manner of reason why the writ of *mainprise* should not be still grantable in other cases.

(f) Sum. 104.
(g) 2. Inst. 190.
(h) F. N. B. 250.
4. Inst. 182.
Coke, B. and Mainp. c. 10.
Vide sup. 10. sect. 72. 74.
2. Hale 142.

F. N. B. 66.
67, 68.
Reg. 78, 79.

F. N. B. 68.
2. Hale 141.

Vide sup. sect.
26.
(a) 1. Sid. 210.
Skin. 61. 76.
227. 23".
Carth. 286.

Farrelly 9.
3. Comm. 129.
4. Modern 183.

Sec. 31. THIRDLY, As to the writ of *homine replegiando*, there seems to be no doubt but that at the common law the sheriff might deliver any persons out of prison by virtue of this writ, except in those special cases mentioned in the statute of *Westminster the first*, c. 15. which is set forth more at large in the next section: And if he had returned, that the plaintiff had been eloigned out of the county by the defendant, he might afterward, by virtue of a *capias in withernam* against such defendant, whether he were a peer or commoner, have taken and imprisoned him till the plaintiff should be replevied. But the writ of *homine replegiando* has been much disused of late, in such cases wherein justices of peace have been authorized to admit persons to bail; yet whether the statutes which gave such authority to justices of peace, being wholly in the affirmative, do take away the sheriff's power in the cases mentioned in those statutes, may deserve to be considered. However, there can be no doubt but that in other cases the writ of *homine replegiando*, (a) and *capias in withernam*, are very proper and effectual remedies.

2. Hale 127.
to 136.

(b) See sect.
41.

Sec. 32. But for the better understanding the sheriff's power in this particular, I shall set down, and endeavour to explain so much of the said statute of *Westminster the first*, c. 15. as relates to it, which is enacted as followeth:—"Forasmuch as sheriffs, and others who have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not repleviable, and have kept in prison such as were repleviable, because they would gain of the one party, and grieve the other: And forasmuch as before this time it was not determined which persons were repleviable, and which not; but only those that were taken for the death of a man, or by commandment of the king, or of the justices, or for the forest: It is provided, and by the king commanded, that such prisoners as before were outlawed, and they which have abjured the realm, provers, and such as be taken with the manner, (b) and those which have broken the king's prison, thieves openly defamed and known, and such as be appealed by provers, so long as the provers be living (if they be not of good name) and such as be taken for house-burning feloniously done, or for false money, or for counterfeiting the king's seal, or persons excommunicate, taken at the request of the bishop, or for manifest offences, or for treason touching the king himself, shall be in no wise repleviable by the common writ, nor without writ: But such as be indicted of larceny by inquests taken before sheriffs, or bailiffs by their office, or of light suspicion, or for petit larceny, that amounteth not above the

“ the value of twelvecence, if they were not accused of ^{2. Inst. 190.}
 “ some other larceny aforetime, or accused of receipt of
 “ thieves or felons, or of commandment, or force, or of aid
 “ in felony done, or accused of some other trespass, for
 “ which one ought not to lose life or member, and a
 “ man approved by a prover after the death of the prover
 “ (if he be no common thief, nor defamed), shall be
 “ henceforth let out by sufficient surety, whereof the sheriff
 “ will be answerable, and that without giving aught of their
 “ goods.”

For the better exposition hereof, I shall distinctly consider,—First, That part of the preamble which declares, what persons had always been agreed not to be replevisable.—Secondly, That part of the purview which shews what other persons shall not be replevisable ;—and, Thirdly, That which shews what persons shall be replevisable.

Of those who by the preamble are declared to have always been agreed to be irreplevisable, there are four kinds.— ^{2. Hale 129. to 132.}
 1. Those who are taken for the death of a man.—2. Those who are taken by the commandment of the king.—3. Those who are taken by the commandment of the justices.—4. Those who are taken for the forest.

As to the first of these particulars, viz. Concerning those who are taken for the death of a man.

Señ. 33. It is observable that the statute declares generally, that those imprisoned for the death of a man have always been taken to be irreplevisable, without making any distinction between such homicide as is *malicious*, and that which happens by *misadventure*, or in *self-defence*. And it is further to be observed, that the *statute of Gloucester*, c. 9. provides, “ That where a man kills another by misfortune, “ or in his defence, or in other manner without felony, “ he shall be put in prison till the next coming of the “ justices in eyre, or justices assigned to the gaol-delivery, “ &c.” And agreeably hereto we find, that all persons in general, who are taken for the death of a man, are excepted out of the writ (*a*) *de homine replegiando*: And that even the superior (*b*) courts, which are not restrained by these statutes, have yet been always cautious of bailing persons imprisoned for any homicide, except in such special cases as shall be set forth more at large in the following part of this chapter.

<sup>2. Hale 129.
2. Inst. 186.</sup>

<sup>2. Inst. 315.
2. Hale 138.</sup>

<sup>(a) Reg. 77.
F. N. B. 66.
(b) 25. Ed.</sup>

<sup>3. 42.
41. Affize pl.
14.</sup>

<sup>37. Affize pl.
12.</sup>

^{29. Affize pl. 44. 1. Roll, 268. 44. Ed. 3. 38. 21. Ed. 4. 71.}

Señ. 34. Also it seems agreed, that justices of peace who have power at this day to bail a man arrested for a light suspicion of *homicide*, cannot bail any such person for

manslaughter,

manslaughter, or even excusable homicide, if it manifestly appear, that he was guilty of the fact, let it be ever so plain that it cannot amount to murder, as shall be shewn more at large

(a) Sect. 63. in the following part of this chapter (a).

Sect. 35. And it is enacted by 3. Hen. 7. c. 1. "That
 (b) See Rex "if it happen, that any person, named as principal or ac-
 w. Cherwynd "cessary, be acquitted (b) of any murder at the king's suit,
 9. St. Trials "within the year and day, that then the same justices be-
 542. "fore whom he is acquitted, shall not suffer him to go at
 "large, but either remit him to prison. or bail him, after
 "their discretion, till the year and day be passed."

As to the second particular, *viz.* That concerning those who are taken by the commandment of the king.

2. Inst. 186,
 187.
 S. P. C. 72.
 1. Roll. 134.
 Dalton c. 114.
 Register 77.

Sect. 36. It seems that the words of the statute concern-
 ing them are to be understood of such only as are imprisoned
 either by the king's personal command, or by the command
 of his privy council, which is looked upon to be as it were
 incorporated with him and to speak with his mouth; and
 accordingly we find the exception in the writ of *homine reple-*
giando", relating to persons imprisoned by the king, thus ex-
 pressed in the Register, "*nisi capti sunt per speciale preceptum*
nostrum;" by which it seems to be implied, that this excep-
 tion is not to be applied generally to every command what-
 soever of the king. To which it may be added, that if it
 were to be understood in so large a sense, it would extend
 even to those who are taken by a *capias* in a personal action,
 for that every such *capias* is the commandment of the king;
 but it seems certain, that a defendant taken by such a *capias*
 is repleviable by the common law. But persons imprisoned
 by the special command of the king, or of his privy council,
 are so far from being repleviable by the sheriff, that they
 have formerly (c) been adjudged not to be bailable even by
 the court of king's bench. However, at this day the law is
 otherwise declared and settled by parliament, as shall be shewn
 more at large in the following part of this chapter.

S. P. C. 72.

(c) 1. And.
 298.
 1. Roll. 134.
 192. 219.
 1. Leonard 70.
 B. Mainpr. 37.

2. Hale 131. Con. Moor 839. 1. Andr. 158.

As to the third particular, *viz.* That concerning persons imprisoned by the command of the justices.

Sect. 37. It is observable, that the exception in the writ
 of *homine replegiando*, in the Register (d), concerning persons
 so imprisoned, is restrained to those who are taken by the
 special command of the king's chief justice. But by *Fitz-*
herbert (e), *Staundford* (f), *Coke* (g), and *Dalton* (h), the
 words of the statute relating to persons so imprisoned, seem to
 be

(d) Reg. 77.
 (e) F. N. B. 66.
 (f) S. P. C. 73.
 (g) 2. Inst. 187.
 (h) Dalt. c.
 114.

be understood in a large sense of any of the king's justices in general, as of those of ASSIZE, as well as of those of the courts of WESTMINSTER-HALL. But it seems that they are not to be understood generally of persons imprisoned by any command whatsoever of such justices, for that those who are imprisoned by their ordinary command, not by way of punishment, but in order only to be safely kept, are said to be repleviable by the sheriff, in cases not prohibited by the statute; and therefore it seems, that they must be taken in a more restrained sense of those only who are imprisoned by the absolute command of such justices by way of punishment, as for a misdemeanor done in their presence, or for other contempts, or such like matters, which lie rather in their discretion than in their ordinary power; and it seems, that a commitment by the chief justice, without shewing any cause whatsoever, shall be intended to be for some such matter; and there can be no doubt but that a person under such a commitment is repleviable by the sheriff. Also it hath been holden, that a person so committed is not bailable upon a *habeas corpus*: But how far persons committed by the absolute command of one court, are bailable by another, shall be more fully considered in the following part of this chapter.

S. P. C. 73.
Dalt. c. 114.
F. N. B. 251.

S. P. C. 73.
Dalt. c. 114.
24. Ed. 3. 33.

1. Roll. 131.

As to the fourth particular, *viz.* That concerning those who are imprisoned for the forest, who also are excepted out of the writ (*a*) of *homine replegiando*.

(a) Reg. 77.
4. Infl. 314.

Sec. 38. It seems, that the said exception is to be understood as well of forests in the hands of subjects, (*b*) as of those in the hands of the king; but it seems, that it is to be understood strictly of proper forests only, and not to be extended (*c*) by equity to chases or parks. And as to imprisonments for offences in forests, the law has been much mitigated by later statutes; for it is recited by 1. Edw. 3. c. 8. "That divers persons had been undone by the chief keepers of forests, &c. against the form of the great charter (*d*) of the forest, and against the declaration (*e*) made by king Edward 1. by which he granted, that trespasses done in his forest, of vert and venison, should be presented at the next swainmote, before the foresters, &c. and that such presentments made before such foresters, &c. should by the oaths of knights, and other discreet and lawful men, &c. by the common assent of all the said ministers, be solemnly written, and with their seals ensealed: And that if any indictment should be in any other manner made, that the same should be void." And thereupon it is ordained, "That from thenceforth no man shall be taken nor imprisoned for vert or venison, unless he be taken with the mai-

(b) 1. Infl. 233.

(c) Reg. 80.
F. N. B. 67.
Ploiden 124.

(d) 9. H. 3.
10. & 16.
(e) 1. Infl. 1.
commonly
called Ordina-
tio Forestarum

“ *nour*, or else indicted after the form before specified : And
 “ then the chief warden shall let him to mainprise till the
 “ eyre of the forest, without any thing taken for his de-
 “ liverance. And if the said warden will not so do, he
 (a) F.N.B. 67. “ shall have a (a) writ out of the chancery, &c. to be at
 Register 80. “ mainprise till the eyre. And if the warden shall not obey
 (b) F.N.B. 67. “ such writ, the plaintiff shall have a (b) writ to the sheriff
 Register 80. “ to attach the said warden before the king, at a certain
 “ day, &c. And the sheriff (the verderers being called to him)
 “ shall deliver him that is so taken, by good mainprise, in
 “ the presence of the verderers, and shall deliver the names
 “ of the mainpernors to the same verderers, to answer in the
 “ eyre before the justices, &c.” And it is farther enacted,
 by 7. Rich. 2. c. 4. “ That no man shall be imprisoned by
 “ any officer of the forest without due indictment, or being
 “ taken *with the mainour*, or trespassing in the forest, &c.”

4. Inst. 290.
 Register 80.
 F. N. B. 67.
 45. Ed. 3. 7.
 2. Hale 132.
 to 135.

SECT. 39. AND NOTE, That persons so indicted, or taken
with the mainour, being imprisoned by such officers, have
 their election either to be mainprised by twelve mainper-
 nors, by virtue of the writ of *homine replegiando*, given by
 the said statute of 1. Edw. 3. c. 8. or to be bailed upon
a habeas corpus, by the judges of Westminster-Hall, &c.
 And if a person be imprisoned for any offence relating to
 the forest, without having been first indicted for it, or taken
with the mainour, there seems to be no doubt but that he
 may have an action of false imprisonment, and may also be
 mainprised or bailed in the manner above mentioned.

AND NOW I am to consider that part of the purview of
 the above-recited statute of Westminster the first, c. 15. which
 shews what other persons are not repleviable, of which there
 are two sorts.

FIRST, Such as are excluded from the benefit of a replevin,
 in respect of the notoriety of their offence

SECONDLY, Such as are excluded from it in respect of the
 heinousness of the crime alleged against them.

Persons excluded from the benefit of a replevin, in respect
 of the notoriety of their offence, are of two kinds.

FIRST, Those who, by an express or implied judgment, sen-
 tence or conviction, or their own confession, appear to be guilty.

SECONDLY, Those who are under violent presumptions
 of guilt.

SECT. 40. AND FIRST, Of those who by judgment, sen-
 tence, conviction, or confession, appear to be guilty, some are
 excluded

excluded from the benefit of a replevin by the express words of the statute; as "those who are outlawed, or have abjured the realm; persons excommunicate, taken at the request of the bishop, and provers." And all other (a) persons who are condemned, or convicted of felony, or any other (b) heinous crime whatsoever, whether by their own confession, or by verdict general or special; (c) and also all those (d) who on their examination own themselves guilty of a felony alledged against them, and are charged in their *MITTIMUS* with the felony so confessed, seem to be excluded from it by parity of reason, and the manifest intent of the statute; for (e) bail is only proper where it stands indifferent whether the party be guilty or innocent of the accusation against him, as it often does before his trial; but where that indifferency is removed, it would, generally speaking, be absurd to bail him: And agreeably hereto the statute of 2. Hen. 5. c. 2. provides, even as to civil causes, "that if upon a writ of *certiorari*, or *corpus cum causâ*, out of chancery, it shall be returned that the prisoner is condemned by judgment given against him, he shall be remanded, &c." Also 23. Hen. 6. c. 10. which ordains, that sheriffs, &c. shall let out of prison persons in their custody by force of any writ, &c. in personal actions, or on indictments of trespass, by sufficient sureties, &c. expressly excepts "all such as shall be in their ward by condemnation, execution, &c." And therefore it cannot be but reasonable to intend, that the said statute of *Westminster* (the first put the cases of persons outlawed and excommunicate as examples only; meaning thereby to intimate, that all other persons under the like circumstances should be in like manner irrevocable: Yet it is certain, that the court of king's bench may, in their discretion, in some special cases, bail a person upon an outlawry of felony; as (f) where he pleads that he is not of the same name, and therefore not the same person with him that was outlawed; or alledges (g) any other error in the proceedings. Also it seems, that the court of king's bench, or justices of gaol-delivery, may bail (h) a person convicted of man slaughter, or as some say, of any other felony, for which he afterwards gets the king's pardon. And (i) there seems to be no doubt at this day, but that they may also bail any person who is guilty before them of homicide in self-defence, or by misadventure. Also it is certain, that if a person appear to be imprisoned for an excommunication, in a cause of which the spiritual court hath no cognisance, he may be delivered either upon a *habeas corpus*, or by quashing or superceding the writ of *excommunicato capiendo*.

SECONDLY, Of those who are under violent presumptions of guilt, and in that respect are excluded by the statute from the benefit of a replevin, there are several kinds.

See.

(a) S. P. C. 74. Summary 101.
Dalton c. 114.
1. Roll. 268.
15. H. 7. 9.
Kelynge 90.
3. Bulst. 113.
114.
(b) Vide infra, Sect. 44.
(c) Dyer 179.
1. Bulst. 87, 88.
15. H. 7. 9.
(d) 3. Bulst.
114.
1. Roll. 268.
4. Inst. 173.
(e) 2. Inst.
Dyer 179.
Summary 100.

See the books above cited, Summary 101.
S. P. C. 74.
2. Inst. 188.

(f) 5. H. 7. 16.

(g) 19. H. 6. 2.

(h) B. Mainp. 94.
Summary 101.
105.

(i) Summary 101. 105.
F. N. B. 246.
F. Corone 297.
354. contra, &c.
S. P. C. 74.
Quere.

Summ. 101, *Seft.* 41. I. *Those who are taken with the mainour* (or rather the mainer, that is, with the thing stolen, as it were in their hands), and by parity of reason, those who are taken freshly upon a hue and cry.

102.

Carthew 79.

2. Inst. 188.

1. Hale 187.

348.

2. Hale 133. 156. Vide c. 18. f. 1. & 4.

Seft. 42. II. *Those who have broken the king's prison*, and by the same reason, those who have broken any other prison, which the law presumes that no innocent person will do.

Summary 102.

2. Inst. 188.

Register, 209.

Seft. 43. III. *Those who are appealed by provers*, who regularly are notailable, because the approver, by confessing his own guilt, induces a strong presumption against those whom he accuses of the same crime of which he owns himself guilty; yet by the express words of the statute, "If the person appealed by an approver be of good reputation he may be bailed, even in the life of the approver; and, unless he be a notorious felon, he may be bailed after his death." And by parity of reason, he may also be bailed if the approver waive (a) his appeal, or be vanquished, (b) unless there be some other cause to detain him in prison, as the appeal of some other approver, &c. And if a person disabled by law to become an approver as one attainted, (c) &c. appeal another of high treason, it seems that the person so appealed ought to be bound (d) to his good behaviour towards the king: But (e) if such person had appealed him of felony only, it seems that he ought to have been wholly discharged, if there had been no other accusation against him.

(a) 25. Ed.

3. 42.

Summary 102.

F. Mainp. 1.

2. Inst. 188.

(b) 25. Ed. 3.

42. pl. 27.

F. Mainp. 2.

(c) *Sum.* 192.

(d) *F. Cor.*

387.

(e) *B. Cor.*

21. 211.

17. Assize 4.

11. Assize 27.

Seft. 44. IV. *Thieves openly known and notorious*, who, as it seems, ought not to be bailed for any fresh felony, whereof there is probable evidence against them. But how far persons accused of any crime shall be so far esteemed likely to have committed it, from their former scandalous behaviour, as to be presumed guilty upon slight evidence, seems in great measure to be left to the discretion (f) of the person who hath power to bail them; who, upon consideration of the circumstances of the whole matter, and the probabilities of both sides, if he find it reasonable strongly to presume them to be guilty, ought not to bail but commit them.

(f) *Sum.* 102.

(g) *Dalt. c.*

114.

(b) *B. Mainp.*

62.

42. *Assize* 5.

Seft. 45. V. *Persons taken for open and manifest offences*, which seems to be understood of inferior crimes of an enormous nature, under the degree of felony, as dangerous riots, (g) favouring of high treason, (b) scandalous extortions,

tortions, conspiracies, (a) by justices, &c. violent and exorbitant rescoues (b) of persons arrested by virtue of the king's writs, misprision (c) of treason, *præmunire*, (d) maim, and such like heinous offences, whereof no one who is notoriously guilty, seems to be bailable by the intent of this statute; for notwithstanding, in the latter part of it, it be said generally, that those who are accused of a trespass, for which a man shall not lose life or member, are replevisable; yet upon the construction of the whole it seems reasonable to qualify the generality of that expression with this limitation, that such accusation ought to be either on a light suspicion; or, if it be on plain and unquestionable evidence, that the offence ought to be inconsiderable; for if all persons whatsoever shall be replevisable for offences not touching life or member, let their guilt be never so notorious, the above-mentioned general unlimited clause, that those who are taken for open offences shall be irreplevisable, must be restrained to felonies and offences touching member, which seems contrary to the most obvious reasonable purport of it, and also to common practice, and that allowed general rule, that bail is only then proper where it stands indifferent whether the party were guilty or innocent; *sed quare*. Yet it seems to be in great measure left to the discretion of the person who has power to admit others to bail, to judge in what cases their crime is so flagrant and enormous, that they ought not to have the benefit of it.

(a) Coke B. & Mainp. c. 5.
27. Affize 12.
(b) Keilw. 165,
F. Execu. 147.
13. H. 7. 21.
Rastal 380.
(c) Sum. 168,
(d) 6, H. 7. 1.

Sup. sect. 44.

Of those who are excluded by the purview of the said statute from the benefit of a replevin, in respect of the heinousness of the crime alledged against them, there are four kinds.

1. Those who are taken for arson.
2. Those who are taken for false money.
3. Those who are taken for falsifying the king's seal.
4. Those who are taken for treason which touches the king himself.

SECT. 46. And all such persons being expressly declared to be irreplevisable, it seems clear, that they can in no case be delivered out of prison by the sheriff, either by virtue of the said writ of *homine replegiando*, or without it: Yet if a person at large be accused before a sheriff, on a light suspicion, of any of these, or of any other of the above-mentioned, crimes, which always have been agreed to be irreplevisable,

vifable, as of homicide, &c. it seems by no means to follow either from the words or intention of the statute, that the sheriff is bound to keep him in prison till he be delivered by due course of law; but in such a case it seems to be more reasonable that he take surety of him to appear in a proper court to answer such accusation; for it seems extremely harsh, and contrary to the first principles of the law, which favours nothing more than the liberty of the subject, to put an officer under a necessity of depriving a man of his liberty upon every accusation of such a crime, be it never so weakly grounded. And the words of the statute, declaring persons to be irreplevifable for such crimes, seem clearly applicable to such only as are under an actual imprisonment, and not to those who are barely accused; for that none can be properly said to be replevied, but those who, being actually imprisoned, are, upon finding pledges, delivered out of custody; from which it follows, that persons not imprisoned are not within the statute: Nay, the law is so far from obliging a sheriff to imprison a man on every accusation whatsoever of such crimes, that it subjects him, as well as any other person, to an action of false imprisonment, if he do it without a reasonable ground; as hath been more fully shewn in the chapters concerning Arrests. But if a person be actually under an arrest, either of a magistrate or of a private person, for any of the above mentioned crimes, it seems clear, from the express words of the statute, that the sheriff cannot replevy him; and it seems, that at the common law he ought to have safely detained the party so arrested till he could have obtained his legal deliverance, and that the person so arrested had no remedy but by indictment or action of false imprisonment against those who arrested and delivered him to the sheriff on a groundless suspicion. But how far the law may at this day be altered in this point, by the universal and allowed practice of sheriffs receiving no person into their custody for any crime without the warrant of some magistrate, shall be more fully considered in the next chapter.

- 2. Inst: 189.
- 40. Affize 33.
- 2. Hale 129.
- 134. 148.
- 5. Modern 323.

SecT. 47. It is certain, that the court of king's bench still may, and always might, bail persons in custody for any of these crimes, notwithstanding this statute; yet in discretion it seldom uses this power but in very special cases, as shall be shewn in the following part of this chapter.

- 2. Hale 134.
- 13

And now I am to consider that part of the purview of the said statute, which shews what persons are replevifable.

For the better understanding whercof, I shall endeavour to explain,

1. The branch relating to persons accused as principals.
2. That which concerns those who are charged as accessories.

As to THE FIRST BRANCH, relating to persons accused as principals,

Sec. 48. Those who are indicted of larceny by inquests taken before sheriffs, or bailiffs, by their office, that is, before sheriffs in their torns, and lords in their leets, are expressly declared to be replevisable; and according to some opinions, those who are indicted or appealed in any other court, of any other felony, not expressly declared by the statute to be irreplevisable, as robbery or burglary, &c. are replevisable by the sheriff *ex officio*, without writ, within the equity of this clause: Yet the authorities which are brought to warrant this opinion, relate only to the bailment of persons by superior courts, upon indictments of appeals of such crimes before such courts, and do by no means prove that such persons are replevisable by the sheriff *ex officio*, without writ: And it is observable, that the writs of mainprise in the Register, for persons indicted only of trespasss, before justices of peace, expressly declare, that such persons cannot be delivered out of prison without the king's special command; from whence it seems to follow, that such persons are not within the common benefit of a replevin by the sheriff, without some such special command. And if persons indicted of trespasss only, before justices of peace, are not within the ordinary remedy of a replevin by the sheriff without a writ, surely it cannot be thought, that persons indicted of higher crimes, and before superior courts, can be any way intitled to it: However, inasmuch as the said statute of *Westminster the first* expressly allows persons indicted of larceny before the sheriff the ordinary remedy of a replevin, and expressly excludes some other particular felonies, and says nothing of others, it seems a reasonable construction of the statute, that the sheriff might by virtue of it, either with or without writ, replevy those who were indicted before himself, or at a court-leet, of those other felonies not expressly excepted, as well as those indicted of larceny only. And the statute leaving such a latitude to the sheriff in relation to the persons so indicted before himself, or at a court-leet, it hath been usual for superior courts (who, though they be not within the statute, have yet always had a great regard to the rules prescribed by it) to use the same liberty in relation to such crimes, and sometimes greater, for such special reasons, and in such special cases, as shall be set forth more at large in the following part of this chapter. Yet notwithstanding the statute seems generally to allow the benefit of a replevin to all those

2. Inst. 190.

S. P. C. 74.
Summary 106.
Dalt. c. 114.
29. Affize 44.
16. Ed. 4, 5.
Coke B. &
Mainp. c. 5.

Reg. 270, 271.

who

Register 269. who are indicted of larceny, &c. without any limitation ;
 2. Inst. 190. yet it hath been always construed to intend only, that
 Summary 100. such persons indicted of a grand larceny as are of a good
 16. Ed. 4. 5. reputation, shall be repleviable ; and therefore if there be
 S. P. C. 74. strong presumptions of their guilt, it seems that they ought
 not to be bailed ; but this is in great measure to be left to
 discretion.

Sett. 49. SECONDLY, Those who are imprisoned for a
 light suspicion, are likewise declared by the statute to be re-
 pleviable. Yet, notwithstanding the words are general,
 Reg. 83. 269. it hath always been taken to be the intent of them, that
 F. N. B. 250. the persons so imprisoned ought to be of a good reputation.
 a. Inst. 190. Also it seems clear, that the statute means only such persons
 as are imprisoned for crimes not expressly excepted by it
 from the benefit of a replevin ; and therefore that this
 branch cannot extend to persons imprisoned for the trea-
 sons mentioned in the statute, arson, or homicide, but only
 to those taken for larceny, robbery, burglary, and such like
 felonies, &c.

Sett. 50. THIRDLY, Those who are imprisoned for petit
 larceny, which does not amount to above the value of 12 *d.*
 are also declared by the statute to be repleviable, “ if they
 2. Inst. 190. “ have not been accused of some other larceny before ;” and
 Register 269. it seems to be agreed, that there is no necessity that such
 F. N. B. 250. persons be of good reputation : yet upon the construction
 Vide sup. sect. 45. of the whole statute, if such persons be taken with the man-
 ner or confess the fact, &c. or their crime be otherwise
 open and manifest, it seems that they ought not to be bailed ;
 but if there be any colour or probability for their innocence,
 it seems most agreeable to the intention of the statute to
 bail them.

Sett. 51. FOURTHLY, Persons accused of other trespasss,
 for which a man ought not to lose life or member, are
 declared by the statute to be repleviable ; yet perhaps the
 generality of this clause is restrained by that other clause
 which declares, that persons taken for open and manifest
 offences shall not be replevied, as hath been more fully
 shewn sect. 45.

Sett. 52. FIFTHLY, The appellee of an approver is also
 expressly declared to be bailable after the death of the ap-
 prover, unless he be a notorious felon.

But having already incidentally shewn, sect. 43. in what
 cases such an appellee is repleviable, I shall refer the reader,
 for this matter, to what is there said concerning it.

Sett.

As to THE SECOND BRANCH, concerning those who are charged as accessaries.

Sett. 53. The Statute is in the following words, "Those who are accused of the receipt of thieves or felons, or of commandment, or of force, or of aid of felony done, shall be replevissable, &c." it is observable, that notwithstanding the statute mentions only those who are accessary by receiving felons, or by commandment, force or aid, yet all those who are accessary to a felony any (a) other way, as by persuasion or any other procurement, or abetment, have always been taken to be within the equity of it; and most (b) of the books relating to this matter seem generally to hold, that all accessaries, whether to homicide or any other felony, are bailable till the principal be convicted, or attainted; and that they are bailable even after such conviction or attainder, upon their (c) pleading to the indictment, and do not express any limitation or restriction, that they be of good fame, or but slightly suspected, &c. And in the case (d) of 25. Edw. 3. 44. pl. 14. wherein a person appealed of murder, as having holden the deceased in his arms while the other killed him, was not let to mainprize; the reason given for it by the reporter is, because the defendant was in a manner a principal; for that otherwise being an accessary only, he ought to have been let to mainprize by the intent of the statute. Yet I find it made a *quære* in the YEAR BOOK of 21. (e) *Edw.* 4. Whether accessaries are to be let to bail of course? And perhaps it may be more reasonable to intend, in the above cited case of 25. Edw. 3. that such person was denied the benefit of mainprize by reason of the notoriety of his guilt; for it seems clear, both from the (f) *Register*, (g) *Fitzherbert*, and (h) *Dalton*, that accessaries to felonies are not to be bailed unless they be of good reputation; and if the want of a good reputation, which is at most but a very slight inducement to presume them guilty of a particular crime, be a good cause to exclude them from the benefit of mainprize, which is given them by the general words of the statute, it seems strange, the strong and unquestionable evidence of their guilt should not much more exclude them from it; especially considering, that it is an allowed rule, (i) that bail is only proper where it stands indifferent whether the person accused were guilty or innocent. And since later statutes have, in many cases, excluded accessaries before the fact from the benefit of clergy, it seems absurd to say, that persons notoriously guilty of being accessary to the crimes which exclude them from the benefit of clergy, shall be admitted to bail; whereas if they had been committed to prison on the like evidence of guilt, as principals, for felonies within the benefit of clergy, or even for inferior offences of an enormous nature, they could not have had the like privilege: And therefore since the general words

(a) Reg. 270.
S. P. C. 71.
F. N. B. 250.
Summary 100.
(b) S. P. C. 71.
B. Mainp. 6. 11.
22. 54. 58.
Summary 100.
2. Hale 135.
Coke B. &
Mainp. c. 5.
Dyer 120.
25. Ed. 3. 42.
40. Ed. 3. 42.
50. Ed. 3. 15.
29. Affize 44.
40. Affize 8.
(c) S. P. C. 71.
Summary 100.
2. Hale 135.
B. Mainp. 58.
64.
40. Ed. 3. 42.
43. Ed. 3. 17.
40. Affize 8.
Cont. 27. Ed.
3. 94.
(d) F. Cor.
135.
(e) 21. Ed. 4.
71.
B. Mainp. 79.
(f) Reg. 270.
(g) F. N. B.
250.
(h) Dalt. c. 114.

(i) Sup. f. 40.

of the statute concerning the repleviving of accessaries, are agreed to receive the above-mentioned limitations, that they ought to be of good reputation, and also to plead first to the indictment, if the principal be attainted; why should it not be reasonable to admit this farther restriction, that their guilt be not notorious? which seems admitted to be implied in most of the other clauses of the statute, which yet are penned in as general words as that relating to accessaries. But this matter seems at this day to be put beyond all question, by 31. Car. 2. c. 2. s. 21. by which it is recited, "That many times persons charged with petit treason, or felony, or as accessaries thereunto, are committed on suspicion only, whereupon they are bailable or not, according as the circumstances making out that suspicion, are more or less weighty, &c." And thereupon it is enacted, "That no person so charged, shall be removed or bailed by virtue of that act, in other manner than he might before." From which it seems clearly to follow, that where there are strong presumptions of guilt against a person so charged, he neither was bailable before that statute, nor is now bailable by virtue of it. (a)

(a) See Rex v. Judd, 2. Term Rep.

As to THE SECOND POINT, viz. In what cases bail is grantable by a *justices of peace* I shall endeavour to shew,

1. How far it is grantable by construction of the statutes, and commission which gives justices of peace a jurisdiction over certain crimes, without saying any thing concerning the power of granting bail;

2. How far it is grantable by the statutes specially relating to the power of granting bail.

As to THE FIRST POINT,

Coke, B. & Mainp. 6. Lamb. 347, 348.

SECT. 54. It seems, that wherever justices of peace have jurisdiction of a crime, they may bail the person indicted before them of such crime, upon such circumstances for which other courts may bail the person so indicted before them; for that it seems to be a good general rule, that so far as any persons are judges of any crime, so far they have power of bailing a person indicted before them of such crime. And, upon this ground, it seems clear, that any two justices of peace, whereof one is of the *quorum*, may, of common right, bail persons indicted before the sessions of justices of peace, for that any two such justices may hear and determine the indictment. (b) Also it hath been holden; that any one justice of peace hath the like power in relation to persons so indicted, because every such justice being a judge of the court which

(b) See the books above cited. Crompton 397. 234, 235. Summary 105.

which is to determine the offence, seems consequently to have a discretionary power of judging whether it be bailable, and of admitting the party to bail. And this seems to be implied by the statute of 1. Rich. 3. c. 3. which giving one justice of peace power of bailing persons arrested for felony, "in like form as if such persons had been indicted at sessions," clearly supposes, that if such persons had been indicted at sessions, they might have been bailed by any one justice: And ^{2. Hale 137.} if any one justice of peace had such power of bailing the persons so indicted at sessions, before the statutes specially relating to the power of justices of peace in granting bail, it seems, that he still has the same power in relation to persons so indicted of any bailable crime under the degree of felony; because the said statutes seem not to restrain him in any such case, under the degree of felony, from any power which he lawfully might claim before. Also it seems to be agreed, that any one justice of peace might always in his discretion either bail or imprison one who has given another a dangerous wound, according as it shall appear from the whole circumstances, that the party is most likely to live or die, for that every such justice being a principal conservator ^{B. 1. c. 63. sect. 19.} of the peace, the offence at present being only an enormous breach thereof, and no felony, seems properly to come under his consueance.

As to THE SECOND POINT, *viz.* How far bail is grantable by justices of peace, by virtue of the statutes specially relating to their power of granting bail.

Stat. 55. It is recited by 1. Rich. 3. c. 3. "That divers ^{2. Hale 137.} persons had been daily arrested and imprisoned for suspicion of felony, sometime of malice, and sometime of a light suspicion, and so kept in prison, without bail or mainprize, to their great vexation and trouble:" And thereupon it is enacted, "That every justice of peace in every shire, city or town, may, by his or their discretion, let such prisoners and persons so arrested to bail or mainprize, in like form as though the same prisoners, or persons, were indicted thereof of record, before the same justices at their sessions."

Stat. 56. But it is recited by 3. Hen. 7. c. 3. "That ^{2. Hale 137.} by colour of the said statute of 1. Rich. 3. divers persons which were not mainpernable, were oftentimes let to bail and mainprize by justices of peace, against the due form of law, whereby many felons had escaped, to the great displeasure of the king, and annoyance of his liege people. and thereupon it is enacted, "That the justices of peace in every shire, city, and town, or two of them at least, whereof

“ one to be of the *quorum*, have authority and power to let
 “ any such prisoners, or persons mainpernable by law, that
 “ have been imprisoned within their several counties, city,
 “ or town, to bail or mainprise, unto their next general
 “ sessions, or unto their next general gaol-delivery of the
 “ same gaols, in every shire, city, or town, as well within
 “ franchises as without, where any gaols be or hereafter shall
 “ be: And that the said justices of peace, or one of them, so
 “ taking any such bail or mainprise, do certify the same at
 “ the next general sessions of the peace, or the next general
 “ gaol-delivery of any such gaol, in every such county, city,
 “ or town, next following after any such bail or mainprise
 “ so taken; on pain to forfeit to the king for every default
 “ thereupon recorded, Ten pounds: And that the afore-
 “ said act, giving authority and power in the premises, to
 “ any justice of the peace by himself, be in that behalf ut-
 “ terly void, and of none effect.”

2. Hale 137.

Stat. 57. And it is recited by 1. & 2. Ph. and Mary, c.
 13. “ That since the said statute of 3. Hen. 7. one justice
 of peace, in the name of himself, and one other of the jus-
 tices his companion, not making the said justice party nor
 privy unto the case wherefore the prisoner should be bailed,
 had oftentimes by sinister labour and means set at large the
 greatest and notablest offenders, such as be not replevisable
 by the laws of this realm, and yet the rather to hide their
 affections in that behalf, had signified the cause of their ap-
 prehension to be only for suspicion of felony, whereby the
 said offenders had and did daily escape punishment, &c.”
 And thereupon it is enacted, “ That from the first day
 “ of April then next coming, no justice or justices of peace
 “ shall let to bail or mainprise any such person or persons.
 “ who for any offence or offences, by them or any of them
 “ committed, be declared not to be replevied, or be forbid-
 “ den to be replevied or bailed by the above-mentioned *Sta-
 tute of Westminster the first.*”

Stat. 58. And it is further enacted, par. 3. “ That any
 “ person or persons arrested for manslaughter or felony, or
 “ suspicion of manslaughter or felony, being bailable by the
 “ law, shall not be let to bail or mainprise by any justices
 “ of peace, if it be not in open sessions, except it be by two
 “ justices of peace at the least, whereof one to be of the *quo-
 rum*, and the same justices to be present together at the
 “ time of the said bailment or mainprise; which bailment
 “ or mainprise they shall certify in writing subscribed or
 “ signed with their own hands, at the next general gaol-
 “ delivery to be holden within the county where the said
 “ person or persons shall be arrested or suspected.”

Stat.

Sec. 59. And it is farther enacted, par. 4. " That the
 " said justices, or one of them being of the *quorum*, when
 " any such prisoner is brought before them for any man-
 " slaughter or felony, before any bailment or mainprise,
 " shall take the examination of the said prisoner, and infor-
 " mation of them that bring him, of the fact and circum-
 " stances thereof, and the same, or as much thereof as shall
 " be material to prove the felony, shall put in writing before
 " they make the same bailment ; which said examination,
 " together with the said bailment, the said justices shall cer-
 " tify at the next general gaol-delivery to be holden within
 " the limits of their commission."

Sec. 60. And it is farther enacted, par. 5. " That the
 " said justices shall have authority to bind all such by re-
 " cognizance or obligation, as do declare any thing material
 " to prove the said offences or felonies, to appear at the
 " next general gaol-delivery to be holden within the coun-
 " ty, city, or town corporate, where the trial thereof shall
 " be, and then and there to give evidence against the
 " party at the time of his trial, and shall certify as well
 " the same evidence, as such bond or bonds in writing as
 " he shall take, at or before the time of his said trial thereof
 " to be had or made. And in case any justice of peace of
 " *quorum* shall offend in any thing contrary to the true
 " intent and meaning of this act, the justices of gaol-de-
 " livery, where such offence shall happen to be committed,
 " upon due proof thereof, by examination before them,
 " shall for every such offence set such fine on every of the
 " same justices, as the same justices of gaol-delivery shall
 " think meet, &c."

Sec. 61. But it is provided, par. 6. " That justices of
 " peace, and coroners, within the city of *London*, and the
 " county of *Middlesex*, and in other cities, boroughs, and
 " towns corporate, shall, within their several jurisdictions,
 " have authority to let to bail felons and prisoners, in such
 " manner and form as they had been before accustomed ;
 " and also shall take examinations and bonds, as is afore-
 " said, upon every bailment by them made, and certify every
 " such bailment, bond and examination, at the next general
 " gaol-delivery, &c."

From these statutes the following particulars appear most
 observable.

Sec. 62. FIRST, That it seems clearly to be implied by
 the above-mentioned statute of 1. Rich. 3. c. 3. which
 authorised any one justice of peace to bail a person on a

Coke, Bail and
Mainp. c. 6.
2. Hale 137,
138.

Supra sect. 54.

slight suspicion of felony, in like manner as if such person had been indicted at sessions, that before that statute justices of peace could bail those only for felony, who had been indicted of it before them. And by parity of reason it seems also to follow, that they had no power to bail persons for any other crime before such indictment, unless it were an offence directly tending to the breach of the peace; the bailing of persons for which seems properly to come under their consuance as conservators of the peace: And therefore it seems difficult to maintain the power of one justice of the peace to bail a person for any other crime, unless it be by some statute limited to the consuance of one justice, or the party have been indicted for it at sessions, because the commission, in giving a justice a general jurisdiction over any crime, shall be construed so far only to give him a power to bail a person accused of it, as it makes him a judge of it, which he cannot be till he come regularly before him by indictment; and the statutes above-mentioned specially relating to the power of justices of peace, in granting bail, expressly require the consuance of two justices.

Sect. 63. SECONDLY, That justices of peace have no power to bail any person not repleviable by the above-mentioned *statute of Westminster the first*, c. 15. from whence it seems to follow, that a person under the actual commitment or arrest of any other magistrate, or even of a private person, for any crime declared to be irrepleviable by that statute, as treason against the king's person, arson, &c. cannot be delivered from his imprisonment by the bailment of any justice of peace. Yet if a person at large be only accused of any such crime, on a slight suspicion, before a justice of peace, it seems that the justice ought not to commit him, but to take surety of him to appear before a proper court, as hath been more fully shewn in relation to the sheriff, section 46. And inasmuch as the above-mentioned statute of 1. & 2. Ph. and Mary, c. 13. expressly mentions the bailing of persons for manslaughter, as well as for other felonies, there can be no doubt, but that justices of peace may, by force thereof, safely bail any person imprisoned on a slight suspicion of a fact, clearly appearing to be no higher an offence than manslaughter, and much more if it appear to amount to no more than homicide by misadventure, or in self-defence. Yet it seems to be agreed, that such justices must, at their peril, take care that the offence in truth amounted not to murder; and that they ought in no case to bail any person who manifestly appears to have been guilty of any of the homicides above-mentioned, either by his own confession, or the notoriety of the fact, not only because the above-mentioned statute of Westminster 1. c. 15. which is
the

2. Hale 138,
139, 140.

Vide sup. f.
33, 34.
Sed vide
2. Hale 138.

1. Roll. 268.
Dalton c. 124.
Summary 99.
Lambard 346,
347.

he pattern prescribed by 1. & 2. Ph. and Mary, for the direction of justices of peace in relation to bail expressly excludes all persons from the benefit of it which are guilty of open and manifest offences; but also because the *Statute of Gloucester*, c. 9. is express, that all persons who are guilty of homicide by misadventure or in self-defence, shall be kept in prison till the next coming of the justices in itinerant, or of gaol-delivery.

Sup. sect. 44.
45.
2. Inst. 314.
315.

Sec. 64. THIRDLY, That the chief import of these statutes is to shew in what manner persons are to be bailed by justices of peace, and not to declare what persons are bailable by them; in relation to which matter, the old rules of the statute of *Westminster the first*, are generally still to be followed, which, extending only to criminal offences punishable in the ordinary way by indictment before the sheriff, &c. give no power to bail persons taken on process in civil actions, or for contempts to superior courts, as by process of rebellion out of chancery. And therefore by a reasonable construction of all these statutes, justices of peace have no power in any such cases to admit any person to bail.

Dalton c. 114.
Crompt. 152.
Sum. 105.

As to THE THIRD POINT, viz. Where bail is grantable by the justices of gaol-delivery.

Sec. 65. It seems to be clearly settled (a) at this day, that such justices may bail any person convicted before them of homicide by misadventure or in self-defence, the better to enable him to purchase his pardon. And if a person convicted of manslaughter before such justices purchase his pardon, it seems, that they may (b) bail him, even after their sessions is determined, till the next sessions of gaol-delivery, that he may come in then and plead his pardon, for that the power of such justices seems (c) to continue for such purposes after their sessions. Also (d) if a man be convicted of manslaughter before such justices, against plain evidence, it is said that they may bail him till the next sessions of gaol-delivery, in order to purchase his pardon in the mean time. But it seems, (e) that justices of peace have no power to bail a man in any of these cases, because they are tied up for the most part to the rules prescribed by the above-mentioned statute of *Westminster the first*. But this statute not (f) extending to justices of gaol-delivery, seems to leave them a discretionary power in those cases wherein it restrains the sheriff from admitting persons to bail. And therefore if a defendant, in an appeal of death, plead an excommunication in disability of the plaintiff, it seems to be holden by *Stauford*, (g) that such justices may bail the defendant from day to day till the plaintiff shall be absolved, for that other-

(a) Crom. 154.
2. Hale 129.
Summary 101.
104, 105.
F. Corone 361.
Dalt. c. 14.
F. N. B. 246.
S. P. C. 15, 16.
Con. 25. Ed.
3. 42.
S. P. C. 74.
F. Corone 354.
B. Mainp. 1.
(b) Crom. 153.
B. Mainp. 94.
Summary 101.
(c) Vide sup.
c. 6. sect. 7.
(d) Crom. 154.
(e) Summary
104, 105.
Vide sup. sect.
63. Con.
Dalton c. 114.
(f) 2. Inst.
185, 186.
(g) S. P. C. 72.

(a) F. Mainp.
6.
3. Affize 12.
Salkeld 61.
seems con-
trary

wife the defendant might lie in prison for ever, without any opportunity of coming to his trial. But it is observable, that the books (a) which are cited for the maintenance of this opinion, speak only of an appeal of robbery: Yet if justices of gaol-delivery have such power of bailing persons in the case of death, on the circumstances above mentioned, as it seems agreed in the cases above-cited that they have, I do not find any reason why they may not, as well upon other such like circumstances, bail persons indicted or appealed before them of any other crime, in such manner as the court of king's bench may do, as shall be more fully shewn under the next point.

AS TO THE FOURTH POINT, *viz.* Where bail is grantable by the courts of Westminster hall, I shall endeavour to shew,

- I. Where it is grantable by the court of king's bench.
- II. Where by the other courts of Westminster-hall.

As to the first of these points I shall consider,

1. Where bail is grantable by the court of king's bench to a person imprisoned by the king's special command, or by the order of his privy council.
2. Where to a person committed by either house of parliament.
3. Where to one committed by the court of chancery.
4. Where to one committed by an inferior court of record.
5. Where to one expressly excluded by the above-mentioned statute of *Westminster the first*, from the common benefit of a replevin by the sheriff.

As to the first of these particulars, *viz.* Where bail is grantable by the court of king's bench to a person imprisoned by the king's special command, or by the order of the privy council.

(b) s. Mod. 73.
1. Sid. 143.
1. And. 297.
1. Legnard 60.

Sec. 66. I do not find but that wherever (b) a commitment by the privy council hath specially expressed the crime
1. Burrow 469. Shebbear's case, Palmer 559,

for

for which the party hath been committed, this court has always admitted him to bail, on the like circumstances on which, in discretion, it will grant bail on other commitments (a). And wherever it has appeared, that persons have been imprisoned by colour of a usurped authority, pretended to be derived from any patent whatsoever, contrary to law, it seems that the said court hath always discharged the persons so imprisoned, without bail. But there have been formerly many opinions, (b) that persons committed by the special command of the king, or of his privy council, without expressing any other cause of the commitment, were not bailable by any court whatsoever, without some intimation of the king's consent to such bailment, by letter from the privy council, or otherwise. And a distinction (c) was taken by some between a commitment by one of the privy council, and a commitment by the whole body; and that the former ought indeed to set forth some other cause of the commitment besides the command of the person who made it; but that the latter needed not any.

(a) 1. Leon. 70.
1. And. 297.
2. Wilson 151.
Wilkes's case. (b) 33. H. 6. 28.
1. And. 298.
1. Roll. 134.
192. 219.
Con. Mo. 839.
1. And. 158.
See the arguments on the habeas corpus concerning loans 81, 82. &c.
(c) 1. Leon. 70, 71.

Sec. 67. But this matter came afterwards to be very solemnly debated in the famous case (d) of *Sir John Corbet* and others, who being imprisoned by a warrant from the privy council, about the third year of the reign of king *Charles the first*, moved the court of king's bench to admit them to bail upon their *habeas corpus*; whereupon it was returned, that they were detained in the prison of THE FLEET by the special command of the king, signified to the warden by a warrant of some of the members of the privy council; in which warrant no other cause of the imprisonment was contained but such special command; And it was strongly urged on behalf of the prisoners, that such imprisonment is against the statute of MAGNA CHARTA, c. 29. which provides, "That no freeman shall be taken or imprisoned, and that the king will not pass upon him, nor condemn him, but by the judgment of his peers, or the law of the land;" and also against many other statutes (e) made in affirmation of MAGNA CHARTA, by which it is ordained, "That no man shall be taken by petition, or suggestion, made to the king or to his council, unless it be by indictment or presentment, or by process by original writ; and that no man shall be imprisoned, &c. without being brought to answer by due process of law; nor be put to answer without presentment before justices, or matter of record, or by due process, and writ original." And it was argued, that the liberty of the subject would be precarious, and lie at the king's mercy, if persons who happen to incur his displeasure, for what perhaps the law esteems no crime, should by means of such a commitment be liable to be forever im-

(d) See the arguments on the habeas corpus concerning loans, and Rushworth's Col. f. 458, &c.

(e) 25. Ed. 3. 4.
28. Ed. 3. 3.
42. Ed. 3. 3.

1. H. 7. 4.

2. Hale 131.

prisoned, without any possibility of redress; and that it seems inconsistent with natural justice to expose a man to so severe a punishment for a supposed crime alleged against him, without giving him an opportunity of clearing himself by a lawful trial. And it was farther urged, that according to the opinion of IR JOHN MARKHAM, in the time of king *Edward the fourth*, the king could not so much as arrest a man upon suspicion of treason or felony, as any of his subjects may; for that if the king should do wrong, the party could have no action against him. Also it was insisted, that the preamble of the *statute of Westminster the first, c. 5.* which declares, "That persons imprisoned by the king's command have always been taken to be irrepleviable," must be intended only of a replevin by the common writ *de homine replegiando*, or by the sheriff *ex officio* without writ, for that it speaks only of a replevin by sheriffs and others, and therefore shall not be taken to extend to superior courts. And it was never thought, that the court of king's bench was restrained by it from bailing persons imprisoned for homicide; and yet all such are equally declared by the statute to be irrepleviable. Many precedents, also, were alleged, whereby it appeared, that persons committed by the king's special command had been discharged upon writs of *habeas corpus*.

Sec. 63. But on the other side it was argued, that such commitment could not reasonably be intended to be against the purview of the statutes above-cited, inasmuch as the said *statute of Westminster the first, c. 15.* which was made in the very next reign after that in which the statute of *MAGNA CHARTA* was made, it was declared to be a settled and undoubted point, that persons committed by the command of the king, which, as it seems to be agreed, is to be understood of the king's special, absolute, and extrajudicial command, are not repleviable: And it cannot be imagined that so high a regard should be paid to such a commitment, if it were thought to be illegal, and contrary to *MAGNA CHARTA*. And it was insisted, that commitments of this kind have often been allowed by the courts (a) of justice, and are mentioned by authors (b) of the best credit since the above-cited statutes, without any the least objection to their legality, and as depriving the party imprisoned by them from the common benefit of the writ of replevin. And it was also strongly urged, that there are often secret causes not fit to be divulged, which may make it necessary for the safety of the state, in some particular circumstances, to restrain some persons from their liberty for a certain time, and that the king, who is entirely entrusted with the management of state-affairs, shall be presumed always to act for the public good; and

Vide sup. sect
36.

(a) Vide sup.
sect 66.

(b) S. P. C.
72. 7.
F. N. B. 6.

and that it is inmodest for any of his courts to question the justice of his proceedings of this kind, which the law seems wholly to have left to his wisdom, or to suffer a suggestion that he abuses his prerogative to cover oppression; and that the subject is in no danger of perpetual imprisonment on this account, for that the court of king's bench hath always used a discretionary power over such commitments, as well as all others, and therefore upon special circumstances of hardship, may admit persons under such commitments to bail; but that where there was nothing extraordinary in the case, it hath been the general course of the court not to do it without a special order from the council for it, as appeared from the examination of most of the precedents relating to this matter. And therefore in the case above-mentioned the court of king's bench was unanimous in opinion, that *Sir John Corbet*, and the other gentlemen so committed by the king's special command, as is above mentioned, had no right, *prima facie*, to demand the benefit of bail, without the consent of the council, and therefore remanded them.

Rush. Col.
part. 1 fol. 510.

1. Roll. 219.
See the arguments on the habeas corpus above mentioned, p. 81.

Sec. 69. But this matter being afterwards considered in parliament, and it being the general opinion, that the chief reason why those gentlemen incurred the king's displeasure was their refusal to pay the loans, which, as they insisted, were demanded of them without sufficient authority; and it being evident, that if there were no certain legal remedy for the liberty of the subject against such a strain of the prerogative, no man could be safe in maintaining his property, either in parliament or out of it, against a disputed demand from the crown, but would be liable to a discretionary imprisonment, and that under colour of law, without any certain redress from the law; it was thought necessary on this occasion to draw up the famous PETITION OF RIGHT, which was afterwards assented to by the king, wherein, among other things, the lords and commons complain to the king, "That against the tenor of the above (a) cited statutes, divers subjects had then of late been imprisoned, without any cause shewed; and when for their deliverance they had been brought before justices by writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause had been certified, but that they were detained by his majesty's special command signified by the lords of his privy council, and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to the law: And thereupon the said lords and commons, among other things, humbly pray, that

Rush. Coll.
part 1. 428:
473. 499, &c.

Rush. Col. p. 1.
fol. 613.
(a) Supra
sec. 66.

that no freeman, in any such manner as is before mentioned, be imprisoned, or detained, &c."

Vid. C. Car.
507. 579. 593.
2. Hale 144.
145.
Vide f. 16.
notes.

Sec. 70. And it seems to have been generally agreed, since the time of this Petition, that wherever any commitment by the privy council hath not expressed, with some convenient certainty, the crime alledged against the party, he ought to be bailed upon his *habeas corpus*.

See Lord
Camden's
opinion upon
the effect of
this statute,
as to its giving
an implied
power to se-
cretaries of
state and pri-
vy councillors
to commit, &c.
11. State Tr.
319.

Sec. 71. And for the greater security of the liberty of the subject against commitments by the command of the king, or of his privy council, it is farther provided and enacted, by 16. Car. 1. c. 10. f. 8. "That if any person shall be committed, restrained of his liberty, or suffer imprisonment by the command or warrant of the king's majesty, in his own person, or by the command or warrant of the council board, or of any of the lords or others of his majesty's privy council; that, in every such case, every such person upon demand or motion to the judges of the king's bench or common pleas, in open court, shall without delay, upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted unto him a writ of *habeas corpus*, to be directed generally unto all and every sheriff, gaoler, minister, officer, or other person in whose custody the party committed or restrained shall be, and such sheriff, &c. shall, at the return of the said writ, and according to the command thereof, on due and convenient notice thereof given unto him, at the charge of the party who requires or procures such writ, and on security by his own bond given, to pay the charges of carrying back the prisoner, if he shall be remanded by the court, &c. which charges shall be ordered by the court, bring or cause to be brought the body of the party before the judges of the court, from whence the same writ shall issue in open court, and shall then likewise certify the true cause of such his detainer or imprisonment; and thereupon the court, within three court-days after such return made and delivered (a), in open court, shall proceed to examine and determine whether the cause of such commitment appearing upon the said return, be just and legal or not, and shall thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner: And if any thing shall be otherwise wilfully done, or omitted to be done by any judge, justice, officer, or other person aforementioned, contrary to the true meaning hereof, that then such person so offending shall forfeit to the party grieved, his treble damages, &c."

(a) See 1. Sid.
78.
1. Kble 305.

Sec.

Señ. 72. But it is provided, par. 9. "That the above-recited clause shall extend only to the warrants and directions of the council-board, and to the commitments, restraints, and imprisonments of any person or persons, made, commanded or awarded, by the king's majesty, his heirs or successors, in their own person, or by the lords and others of the privy council, and every one of them."

As to the second particular, *viz.* Where bail is grantable by the court of king's bench to a person imprisoned by either house of parliament.

Señ. 73. There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those houses, and that wherever the contrary does not plainly and expressly appear, it shall be presumed that they act within their jurisdiction, and agreeably to the usages of parliament, and the rules of law and justice: And therefore, wherever it stands indifferent upon the return of a *habeas corpus*, whether a commitment by either of those houses were strictly legal or not, and the parliament be still sitting, I can find no precedent that the prisoner hath been bailed by the court of king's bench. And it cannot but be expected, that those houses would be apt to resent an attempt of this kind, which might seem to carry with it an implicit reflection on their honour, as unjustly depriving a subject of his liberty, and putting him under a necessity of demanding justice from another court, by unreasonably refusing to restore him to it; which surely shall never be intended, where their proceedings are capable of a more favourable construction. And therefore in *Lord Shaftesbury's Case*, who, upon his *habeas corpus* in the king's bench, was returned to have been committed by the house of lords for a high contempt committed against that house, the court would not take notice of any exceptions against the form of the commitment, as that it was too general, and did not express the nature of the contempt, or in what place it was committed, &c. for that it shall be presumed, that it was such for which the lords might lawfully make such an order, and no other court shall prescribe to them in what form they ought to make it. But if it be demanded, in case a subject should be committed, by either of those houses, for a matter manifestly out of their jurisdiction, what remedy can he have? I answer, that it cannot well be imagined that the law, which favours nothing more than the liberty of the subject, should give us a remedy against commitments by the king himself, appearing to be illegal, and yet give us no manner of redress against a commitment by our fellow-subjects, equally appearing

Regina v. Paty, Ld. Ray. 1105, Chancey's Case, 12. Rep. 83. Bulhell's Case, Ld. Vaugh. 135. Ld. Shaftesbury's Case. 1. Mod. 144. Dr. Shebbear's Case, 1. Burrow 460, and the cases cited in the following note.

See the Case of Joy and Topham, 8. St. Tr. 5.6.

pearing to be unwarranted. But as this is a case which, I am persuaded, will never happen, it seems needless over nicely to examine it.

The doctrine contained in this section has been confirmed in several memorable instances. In Easter Term 24. Geo. 2. the Honourable Alexander Murray was committed to Newgate, by the house of commons for a contempt of privilege. A habeas corpus issued; and Wright, Denison, and Foster, were clear that the court of king's bench had no jurisdiction in the case; for that both houses of parliament, in concurrence with every court of record, even the lowest, has an exclusive right to commit for a contempt. Lord HOLT also thought the right existed for contempts committed *in the face* of the house, 1. Wilson 299.—In Easter Term 3. Geo. 3. C. B. on Mr. Wilkes's case (vide *infra*, c. 16.) Pratt, C. J. and the whole court, declared they had no power to decide upon the privileges of parliament.—Lord CAMDEN, in the case of *Entick v. Carrington*, Mich. 6. Geo. 3. 11. St. Tr. 517. says, the rights of that assembly (*viz.* house of commons) are original and self-created; they are paramount to our jurisdiction, and above the reach of injudgment, prohibition, or error.—And in Easter Term 11. Geo. 3. Brads Crosby, Esq; lord mayor of London and a member of parliament, was brought to the common pleas, on a habeas corpus at common law, to be released from a commitment by virtue of the speaker's warrant for a contempt. De Grey C. J. delivered the unanimous opinion of the court, that the house of commons are the exclusive arbiters of their own peculiar privileges, 4. Inst. 47. Dyer 59, that their power of committing is inherent from the very nature of their institution, 3. Jac. 1. c. 13. Ashby and White, 8. St. Tr. 60. Ld. Raymond 638, that their adjudication is tantamount to a conviction, and their commitment equal to an execution; and that no court can discharge a prisoner committed in execution by another court, Cro. Car. 168. His Lordship was accordingly remanded, 2. Black. 755. 3. Wilson 188.

Skinner 56,
163. 527.

Sec. 74. However it seems agreed, that a person committed for a contempt, by the order of either house of parliament, may be discharged by the court of king's bench after a dissolution or prorogation of the parliament, whether he were committed during the sessions or afterwards, for that all the orders of parliament are determined by a dissolution or prorogation; and all matters before either house must be commenced a-new at the next parliament, except only in the case of a writ of error: And if the subject should be deprived of his liberty till the next parliament, which perhaps may not meet again in many years, no one could say when his imprisonment would end.

1. Keb. 871.
88-, 888.
1. Mod. 245.
1. Levinz 167.
1. Modern
355. 157.

Shower 100.

Sec. 75. But it is holden in *Shower's Reports*, that a lord committed by the house of lords, on an impeachment of treason, and afterwards pardoned, cannot be discharged by the court of king's bench, because the impeachment being in a superior court, the pardon must be pleaded there; and the commitment being by the lords, the king's bench cannot take cognisance of it. Yet it seems to have been taken for granted, in the *Lord Stafford's case*, that the court of king's bench may, in their discretion, bail a lord upon an impeachment of high treason, which in that case they refused to do, not as a matter out of their power, but as a thing which they were not bound to do, and improper on consideration

Raym. 381.
Skinner 56,
162, 163.

consideration of the whole circumstances. And though the reasons above cited from *Shower's Reports* seem proper to prove, that the court of king's bench cannot discharge a prisoner from any impeachment in parliament whatsoever; yet they seem by no means to prove, that they cannot bail him. But it is observable, that it doth not clearly appear, from either of the above-mentioned reports, whether any parliament were sitting at the times of the motion, for such discharge and bailment, or not; but it is certainly most likely to prevail in such a motion, when no parliament is sitting, nor likely soon to sit, and after the party hath been long in prison; because, in such a case, if he should not be bailed, he might be perpetually imprisoned for a crime, without any opportunity of making his defence.

Carthew 132
133.
Salkeld 503.
The Earl of
Castlemain
was commit-
ted by the
Commons,
1. W. & M.
for high trea-
son, and bailed
by the King's
Bench,
4. State Tri-
als 397. •

As to the third particular, *viz.* Where bail is grantable by the king's bench to a person committed by the court of chancery.

SECT. 76. Little is said in the books, except in the reign of king *James the First*, at the time when *Sir Edward Coke* was chief justice, when this matter was very much litigated, and occasioned great heats between the two courts, and several persons committed to THE FLEET by the chancellor were bailed by the court of king's bench, upon exceptions to the generality of the form of the commitments, as (a) not shewing the time of the commitment, or setting (b) forth only the command of the lord chancellor as the ground of the imprisonment, without mentioning any crime at all, or mentioning the crime in (c) general terms, as for a contempt to the court of chancery without shewing what the contempt was, or at what time committed: And one (d) *Glanvil*, who was generally committed by the command of the lord chancellor, without setting forth any cause of such command, seems to have been bailed upon examination of the merits of the decree, for disobeying whereof he was in truth committed; whereby it appeared that the decree related to a matter before adjudged at the common law, which was thought contrary to the purport of the (e) statutes of 27. Edw. 3. c. 1. and 4. Hen. 4. c. 23. But this proceeding being relented by the lord chancellor, the said *Glanvil* was afterwards recommitted by him for the same matter, and yet was afterwards, on another *habeas corpus*, bailed the second time by the court of king's bench: But I have not met with any precedent of this kind of late years; and how far the long disuse of such like proceedings, may have lessened the authority of the cases above-mentioned, may deserve to be considered. However it cannot but

(a) 1. Roll.
192. 218.
(b) Moor 839.
1. Roll. 219.
(c) 1. Roll.
192. 218, 219.
(d) 1. Roll.
111. 219.
Moor 838.
2. Bull. 301.
C. Jac. 343.
like Case.
3. Bull. 115.
1. Roll. 277.
(e) Vide
1. Roll. 277.
3. Bull. 115.
Dalison 81.
3. Leonard 18.

be

Vaughan 130.
140. seems
contrary.

Vide b. 1. c.
19. f. 17.

1. Modern
155.
Moor 840.

be expected, that the superior courts will pay the highest regard to one another's proceedings, and be ready to presume, that they are agreeable to law, unless the contrary appear, or the case be very particular and extraordinary, which may perhaps reasonably induce them, in some circumstances, to make exceptions from those general rules which in common cases usually govern their discretion. But what case in particular may be said to be of so extraordinary a nature, it would be needless and presumptuous for me to endeavour to examine. But as to the case above-mentioned, which was formerly so much litigated, concerning the chancery's giving relief against a judgment at law, since it seems to be settled at this day, that the chancery may, in some cases, give relief against the unequitable use of such a judgment, especially as to a point not relievable by law; whenever it stands indifferent whether the matter examined by chancery, after a judgment at law, be of such a nature as is proper for relief in chancery, or not, it is not probable that any other court of WESTMINSTER-HALL will easily presume that it is not, when the chancellor, who is the proper judge, hath determined that it is: And agreeably hereto it hath been adjudged, that a commitment from chancery for disobedience to a decree, is good, without shewing what the decree was.

Holt 590.
3. Balk. 91.
284.
Vaughan 157.

6. Modern 73.
Raymond 381.
2. Ld. Raym.
978.
12. Modern
102. 155.
3. Hale 112.

See *Busby's*
case in Vaug-
han's Re-
ports.

As to the fourth particular, *viz.* Where bail is grantable by the court of king's bench to one committed by an inferior court of record.

Sec. 77. It seems, that this court, having the supreme controul of all inferior courts, may, in discretion, on consideration of the whole circumstances of any case whatsoever, bail any person who shall appear to have been unjustly or hardly deprived of his liberty by any inferior court. And therefore, wherever it shall clearly and expressly appear, that a person hath been committed by any such court, for a matter which either is in truth no crime at all, or if it be a crime, is not within the jurisdiction of such court, there can be no doubt but that it is a proper motion to the king's bench to bail him. But in what other cases in particular one may hope for the like success in a motion of this kind, it seems difficult to determine (1); for that every such case depends upon its particular circumstances, which have great weight with the court in its determinations of this kind, in which it is in great measure left to its discretion. And therefore, though perhaps it may bail a man on a commitment by a mayor of a town, or justice of peace, or other inferior

(1) In the case of an impressed apprentice the king's bench may issue a warrant to bring him up, without putting him to the circuitry of a *habere corpus*. LORD MANSFIELD; 3d May 1779. 2. Bull. 139, 140.

ferior

ferior magistrate, for a contempt, without shewing the particular nature of it; yet it cannot be expected, that it will with the like readiness bail a man on such a general commitment by a court of higher (a) dignity, as a court of *oyer and terminer*, or any other court of WESTMINSTER-HALL; to the honour of whose proceedings the greatest regard is always to be given: and on this ground chiefly, as I suppose, where a person on a *habeas corpus* was returned to have been committed by an order of the exchequer, for not paying a fine of Fifty pounds by the ecclesiastical commissioners imposed upon him, the court of king's bench (b) refused to bail him, though it was not shewn wherefore the said fine was imposed. And as a great regard is always paid to the dignity of the court by which the party is committed, so is it likewise to the notoriety of the offence; and therefore, where a person convicted of buying and selling old money, before justices of *oyer and terminer*, was committed in execution for the fine, by an order of the court not strictly formal, yet the court of king's bench refused (c) to bail him; for this reason chiefly, because he was in execution, and his commitment was defective only in point of form. Also where persons taken in execution for their fines to the king, set on them by a sessions of justices of peace, have not only brought their *habeas corpus*, but also their *writ of error* in the king's bench, and assigned errors, yet the court has refused to bail them. But I take it for granted, in those cases, which are but briefly reported, that it appeared upon the whole record, that such fines were legally imposed. Also it seems, that the said court has sometimes been induced to deny persons committed by other courts by warrants not strictly formal, the benefit of bail, for the enormity, dangerous tendency, or obstinacy (d) of their offence, which if it had been attended with less aggravating circumstances might not have excluded them from it. Also the said court, in determining whether it be proper to bail a man committed by another court, usually considers all the other circumstances of the case, as the length (e) and hardship (f) of the imprisonment, and such like, in order to give such a determination upon the whole, as may be most agreeable to the honour and prerogative of the crown, and the liberty and safety of the subject.

SECT. 78. But it seems to be agreed, that no one can in any case controvert the truth of the return to a *habeas corpus*, or plead or suggest any matter repugnant to it. Yet it hath been holden, that a man may confess and avoid such a return, by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them. And upon this ground, where one *Swallow*,
a citizen

(a) See the precedent section, & C. Jac. 219. & Vaugh. 139, 140.

(b) C. Car. 579.

(c) 1. Sid. 140. 286. 320.

Salkeld 348. 5. Mod. 19, 20. &c. March 52, 53. 1. Sid. 288, 289. 320.

(d) 1. Bullst. 48. to 54.

1. Roll. 220.

337. 411.

(e) 1. Roll.

218. 337.

2. Bullst. 140.

(f) Latch. 127.

1. Sid. 287,
288.

a citizen of London, was committed for refusing to accept the office of an alderman of the said city to which he had been elected, and the custom of the city justifying a commitment for such a refusal, and the election and refusal were set forth in the return to the *habeas corpus*, he filed a suggestion in the crown office, that he was an officer of the king's mint, and that all such officers were exempted from all city-offices, both by prescription and by the king's charter: and thereupon, the patent of the grant of his office, and also the patent of the exemption being inrolled in the court, he was discharged.

5. Mod. 323.
454, 455.
2. Jones 222.

(1) In Trinity
Term, 4. Geo.
1.

Seft. 79. Also the court will sometimes examine by *affidavit* the circumstances of a fact on which a prisoner brought before them by an *habeas corpus* hath been indicted, in order to inform themselves, on examination of the whole matter, whether it be reasonable to bail him or not. And agreeably hereto, where one *Jackson*, who had been indicted of piracy before the sessions of admiralty (1) on a malicious prosecution, brought his *habeas corpus* in the said court in order to be bailed, the court examined the whole circumstances of the fact by *affidavits*; upon which it appeared, that the prosecutor himself, if any one, was guilty, and carried on the present prosecution to screen himself; and thereupon the court, in consideration of the unreasonableness of the prosecution, and the uncertainty of the time when another sessions of admiralty might be holden, admitted the said *Jackson* to bail, and committed the prosecutor till he should find bail to answer the facts contained in the affidavits.

As to the fifth particular, *viz.* Where bail is grantable by the court of king's bench to one excluded by the above-mentioned statute of *Westminster the first* from the common benefit of a *replevin* by the sheriff.

Seft. 80. It cannot be doubted, but that, notwithstanding
(a) 2. Inst. 185, 186, 189. neither (a) the judges of this nor of any other superior
2. Hale 129. court of justice are strictly within the purview of that statute, yet (b) they will always, in their discretion, pay a due
148. regard to the rules prescribed by it, and not admit a person
Summary 104. to bail who is expressly declared by it to be irrepleviable,
Salkeld 61. (b) 3. Bulst. 113. without some particular circumstance in his favour. And
Roll. 168. therefore it seems difficult to find an instance where persons
Sup. f. 33. attainted (c) of felony, or but convicted thereof by verdict
Latch. 12. general or (d) special, or notoriously (e) guilty of treason or
S. P. C. 74, 75. Skinner 683.
5. Mod. 454, 455. (c) Kelynge 90. (d) Dyer 179. 1. Bulst. 87, 88: (e) 1. Roll.
268. Raym. 381. 3. Bulst. 113, 114. 5. Mod. 455. Vide sup. sect. 33. 1. Salkeld 103.

manslaughter,

man's slaughter, &c. by their own confession or otherwise; have been admitted to the benefit of bail (*), without some special motive to induce the Court to grant it: As where (a) (a) 5. H. 7. a person taken by a *capias utlagatum*, on an appeal of felony, by the name of *J. S. gentleman*, pleads that his name is *J. S. yeoman*, and not *gentleman*, and so he is not the same person who was outlawed, in which case the court in discretion may bail him; for until the plea is determined, it appears not whether he were the person intended, or not: Or where (b) a person outlawed alleges an error in the record, in which case also the court, *ex gratia*, may bail him, especially if the error be apparent: Or where a man is convicted (c) of felony, upon evidence by which it plainly appears to the court that he is not guilty of it; in which case (c) 19. H. 6. 2. S. P. C. 74. 2. Inst. 188. Summary 101. S. P. C. 74. 1. Sid. 316. (c) Crom. 154.

(*) THE COURT of king's bench has power to bail in all cases whatsoever, Lord Mansfield, Cowper 333; and the judges will in general exercise it in favour of a prisoner in every case not capital; in capital cases where there is any circumstance to induce the court to suppose he may be innocent; and in every case where the charge is not alleged with sufficient certainty. 1. Bac. Abr. 222. notes.—The Court, therefore, will bail a person committed for high treason generally, if four Terms have elapsed and no prosecution commenced. Strange 5. Or for treason done upon the high seas. Holt 83. So also a man and his wife committed for felony, if the assizes have intervened and they have endeavoured to bring on the trial. Andr. 64. So also a person convicted upon an appeal of murder, subject to an argument on a plea in abatement, (three years having elapsed without either side bringing it on) provided the appellant will actually consent. Strange 403. So also a person who was convicted of keeping an alehouse, &c. he having brought a *certiorari*. Strange 531. So a person acquitted on an indictment of murder, and afterwards in custody on an appeal, unless the judge certifies a dissatisfaction at the verdict. Strange 854. So also a person appealed of murder who has not been indicted, provided there is any delay on the part of the appellant. Strange 856. 859.—So also a person committed for manslaughter, if it appear to be no more upon the depositions before the coroner. Strange 911. 1242. So also in murder and pardon pleaded and allowed, the defendant shall not give even bail to answer the appeal though the heir is beyond sea, for this is not within 3. Hen. 7. Strange 1203. So also in rape both principal and accessory will be bailed, if it appear they do not mean to abscond. 4. Burr. 2179. And the Court is bound *ex debito justitiæ* to bail an accomplice intitled to the king's pardon. Cowper 334. And although it be not necessary to state in a warrant of commitment for felony that the act was done *feloniously*; yet unless it sufficiently appear to the Court that a felony has been committed, they are bound to admit the prisoner to bail, *Rex v. Judd*, 2. Term Rep. 255.

But this Court will not look into the coroner's depositions to bail a gaoler committed for murder. Strange 851. Nor will they bail an appellee for murder unless circumstances of delay appear on the part of the appellant. Strange 854. Nor a person charged with a highway robbery, if the prosecutor attend and swear he is the man, notwithstanding a number of affidavits are produced to the contrary. Strange 1138. Nor for assisting in the running of contraband goods, &c. Bunb. 143. Nor will the Court order at the instance of the prisoner a medical man to attend the person wounded by the prisoner, in order to state his situation for the purpose of bail. Strange 547. Nor will they bail after an indictment of murder upon an affidavit of the fact. 1. Salkeld 104. Skinner 683. See also *Rex v. Homer*, Caldecot 295. that upon application to bail for felony the Court requests to see the depositions; and will thence, if they see just cause, without regarding the regularity or irregularity of the commitment, discharge, bail, or detain the prisoner.

even the justices of gaol-delivery may bail him : Or where
 (b) 5. Modern (b) it appears to the court that the prosecutor of an in-
 454, 455. dictment, or the plaintiff in an appeal, hath unreasonably
 1. Sid. 78. delayed his prosecution ; as where two *nihil*s are returned
 3. Bulst. 85. upon two writs of *scire facias* awarded against a plaintiff
 Palmer 558, in an appeal removed by *certiorari* into the king's bench,
 509. and the prisoner hath lain a long time under confinement :
 1. Keble 305, Or where (c) the defendant in an appeal hath pleaded an
 306. excommunication in disability of the plaintiff ; in which
 48. Ed. 3. 22. case it is apparent that the plaintiff cannot proceed at pre-
 (c) 3. Aff. 12. sent ; and if the defendant should be kept in prison till the
 13. Ed. 4. 8. plaintiff be absolved, he might be a prisoner for life : Or
 B. Mainp. 48. where (d) it appears to the court, that the defendant may
 73. be in danger of losing his life, either by famine (1) or a
 S. P. C. 72. dangerous distemper, &c. if he continue longer in prison.
 (d) Latch. 12. Co. Lit. 289.

(1) The fact of indisposition, upon which the Court will bail, must be a present indisposition, arising from the confinement, and not from any constitutional or family distemper, or from the act of the prisoner. 10. Modern 334. Vide also Strange 49. 543. Holt 85. Cowper 333.

As to THE SECOND POINT, viz. In what cases bail is grantable by the other courts of Westminster-hall ; I shall consider,

First, How far it is grantable by such courts to persons committed for causes under the degree of treason or felony.

Secondly, How far it is grantable to persons committed for treason or felony.

As to THE FIRST POINT, viz. How far bail is grantable by the said courts to persons committed for causes under the degree of treason or felony.

(c) 2. Inst. 53. Sect. 81. It seems (c) that the courts of common pleas
 55. 615. and exchequer, at any time during Term, and the court of
 4. Inst. 290. chancery, either in Term or Vacation, may award a *habeas*
 2. Hale 147. *corpus* by the common law, for any person committed for
 Vaughan 154. any such cause, and thereupon discharge him, if it shall clearly
 155, 156, 157. appear by the return, that the commitment was against
 2. Andr. 197. law (as being made by one who had no jurisdiction of the
 Dalison 81. cause, or for a matter for which by law no man ought to
 3. Leonard 18. be punished), or bail him, if it shall be doubtful whether
 2. Jones 13, the commitment were legal or not, &c. However it is
 14. 17. certain at this day, that by force of the *habeas corpus* act,
 2. Modern par. 3. & 10. set forth more at large Sect. 17. and 22. any
 198. 306. of the said courts, in Term-time, and any judge of either
 bench, or baron of the exchequer, being of the degree of
 the

The coif, in the Vacation, may award a *habeas corpus* for any prisoner whatsoever who is bailable by the intent of that act, and thereupon bail him.

As to THE SECOND POINT, *viz.* How far bail is grantable by the said courts to persons committed for treason or felony.

Sec. 82. It is observable, that the above-mentioned clauses of the said *habeas corpus* act extend not to persons committed for treason or felony, plainly and specially expressed in the warrant of commitment. Neither do I find any printed case, wherein persons committed for such crimes have been bailed either by the courts of common pleas or exchequer. However it is certain, that in some cases persons committed for felony are bailable by the court of chancery. But our law-books being generally silent in relation to these matters, I shall refer the reader for the more accurate knowledge of them to observation and experience.

See Vaughan.
156, 157.
2. Jones 14.
Register 271.

As to THE SEVENTH GENERAL POINT of this chapter, *viz.* In what form bail is to be taken.

2. Hale 126,
127.

Sec. 83. It seems to be the practice of the court of king's bench in admitting a person to bail, who is actually (a) present in court, upon an indictment or appeal (b) of felony, or other crime, punishable with loss (c) of member, to take (d) a several recognizance to the king in a certain sum from each of the bail, that the prisoner shall appear at a certain day &c. and also, that the bail shall be liable for the default of such appearance, &c. body for body. And it seems (e) to be left to the discretion of justices of peace, in admitting any person to bail for felony, to take the recognizance either in a certain sum, or else body for body. But (f) where a person is bailed by the court of king's bench, before the return of a *capias* awarded against him for felony, or (as it seems to be implied in the hook cited in the margin that he may be) in any court for a crime of an inferior nature, it seems, that the recognizance ought to be only in a certain sum of money, and not body for body. However it is certain (g) at this day, that persons bound body for body, are not liable, on the forfeiture of the recognizance, to such punishment to which the principal is to be adjudged, if found guilty, but only to be fined, &c.

(a) 1. Bullf.
45.
(b) 2. Jon. 210.
(c) Levinz
106. Con.
1. Sid. 211.
(d) 4. Inst.
178.
1. Bullf. 45.
21. H. 7. 20.
Con. 1. Sid.
210.
Vide 2. Jo. 222.
(e) Sum. 97.
Crom. 335.
2. Inst. 178.
Dalt. c. 127.
seems contrary.
(f) 1. Bullf.
45.
(g) 4. Inst.
178.
S. P. C. 65.
F. Mainp. 13.
1. Black 648.

21. H. 7. 20. Summary 97. 2. Hale 125. Con. F. Mainp. 12. Strange 911.

As to THE EIGHTH GENERAL POINT of this chapter
viz. What shall forfeit the recognizance.

(a) Dalt. c.

127.

8. P. C. 77.

4. Inst. 178.

(b) S. P. C. 77.

(c) 2. Inst.

150.

4. Inst. 178.

2. Hale 126.

(d) Dalt. c.

127.

Vide 4. Bur.

75.

N. B. A feme covert cannot be bound by recognizance, because it cannot be estreated.
Stylcs 369.

Queen v.
Redpath, East-
ter 11. Ann.
10. Mod. 152.
Fort. 358.

1. Burrow 10.
54. 398. 431.
3. Burrow
1461.
4. Burrow
2119. 2126.

Sec. 84. If on a bailment for felony, the usual (a) form, "*ad standum recto de feloniam prædictam et ad respondendum domino regi,*" be made use of, and at the trial the party stand obstinately mute, it may reasonably be argued, that in strictness the recognizance is forfeited, for (b) that the expressions above-mentioned seem to import at least thus much, that the prisoner shall make some answer; and at the common law, before the *statute (c) of Marlebridge*, c. 28. if a person under bail had insisted on his privilege as a clerk, and refused to answer to the crime alledged against him, his sureties were to be amerced; and though the said statute has in that case excused the bail, yet an obstinate refusal to answer in other cases may perhaps remain as it was at the common law. *Mr. Dalton (d)* indeed seems to be of another opinion, because the words above-mentioned are always used of course; but it seems strange, that words should be looked on as idle and insignificant because they are most usual and proper. However, if late practice and experience have been agreeable to the above-mentioned opinion of *Dalton*, as I apprehend they have, they will certainly be of great force to maintain it; and indeed it must be confessed, that if a man's bail, who are his gaolers of his own choosing, do as effectually secure his appearance, and put him as much under the power of the court as if he had been in the custody of the proper officer, they seem to have answered the end of the law, and to have done all that can be reasonably required of them: But howsoever the law may stand in relation to this case, it is certain, that if persons be bound by recognizance, that *J. S.* shall appear in the king's bench the first day of such a Term, to answer to such an information against him, and not depart till he shall be discharged by the Court, and afterwards THE ATTORNEY GENERAL enter a *nolle prosequi* as to that information, and exhibit another, on which the defendant is convicted, and refuses to appear in court after personal notice, the recognizance is forfeited; for being exprefs that the party shall not depart till he be discharged by the Court, it cannot be satisfied unless he be forthcoming, and ready to answer to any other information exhibited against him while he continues not discharged, as much as to that which he was particularly bound to answer to. But in such case it seems, that the recognizance shall not be forfeited by the party's not appearing in court the first day of every Term, after he hath pleaded to the information, as it may be before he hath pleaded.

† *Sec. 85.* But it is recited by 4. Geo. 3. c. 10. that many recognizances have been estreated into the court of exchequer

Exchequer against persons for not appearing as parties or witnesses, or for not prosecuting indictments, or for otherwise not performing the conditions of such recognizances, many of which neglects have happened from the inattention of ignorant people; whereupon it is enacted, "That it shall be lawful for the barons of the exchequer, upon affidavit and petition to be presented to them, by or on the behalf of the person or persons imprisoned or liable to be imprisoned on the forfeiture of any such recognizances, to discharge such person or persons, by order from the said barons, without any *quictus* (a) to be sued out for that purpose, for which order no more than one pound and one shilling shall be taken by the officer appointed to give out the same.—Provided that no discharge shall be given on such petition where any debt is due to the crown, other than by the recognizances so prayed to be discharged; nor in any cases of defrauding his majesty's revenue by contraband trade, or assaulting the officers of the customs or excise in the execution of their duty, or any person or persons lawfully assisting them therein."

(a) For the form and method of obtaining a *quictus*, vide *Cro. Cir. Com.* 61, 62.

On a recognizance estreated for not being punctually complied with, if the party take his trial the next session, he may compound for a very small matter in the court of exchequer, because the effect, though not the exact form, of the recognizance is complied with. 10. *Modern* 278.—And if the money be levied, the Court will order the prosecutor's costs to be paid, and the surplus returned. 4. *Burrow* 2118.

Recognizances in cases of felony are to be certified to the general gaol-delivery. 1. & 2. *Phil. and Mary*, c. 13.—If a defendant indicted for perjury be acquitted, the bail shall be discharged from their recognizance, on motion, though the acquittal is not entered on record, for the acquittal appears on the *poslea*. 1. *Wilson* 315.—Neither the defendant nor his bail can be called upon their recognizance without notice, except on the day on which the defendant is bound to appear. *B. R. H.* 237. And if the defendant do not appear upon that day, the Court will not discharge the recognizance, although the attorney-general consent to it, but they will respite it till the next Term. 11. *Modern* 200. For the judges of *oyer and terminer* are the proper judges whether recognizances ought to be estreated or spared. 10. *Modern* 278.—On conviction, if the offender be pardoned on condition of transportation, yet he may be surrendered in discharge of bail, *Strange* 1217. by writ of *habeas corpus* on the crown side. But if he be actually on board the transport the Court will not issue the writ. 4. *Burrow* 2034.

CHAPTER THE SIXTEENTH.

OF COMMITMENTS.

AND now I am to consider in what cases, and in what manner, offenders are to be committed.

For the better understanding whereof I shall examine,

1. What kind of offenders are to be committed.
2. By whom.
3. To what prison.
4. What is to be done previous to their commitment.
5. What ought to be the form of it.
6. At whose charges they are to be sent to prison.
7. To what court the commitment is to be certified.
8. By what means the party may be discharged from such commitment.

As to THE FIRST POINT, *viz.* What kind of offenders are to be committed.

2. Hale 123,
124.
1. Burrow
460.

Sec. 1. There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed (1)

(1) A prisoner in the custody of the king's messenger, on a warrant from the secretary of state, who is brought into the king's bench by *habeas corpus* to be bailed, but has not his bail ready, cannot be committed to the same custody he came in, but must be committed to the custody of the marshal, which will prevent the necessity of suing out a new *habeas corpus* as he may be brought up from the prison of the court, by A RULE of court, whenever he shall be prepared to give bail. 1. Burrow 460.

Sec. 2. And it is said, that whosoever a justice of peace is impowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol, to remain there till he shall comply.

As

AS TO THE SECOND POINT, *viz.* By whom such persons are to be committed.

Sec. 3. It seems to be agreed by all the old (*a*) books, (*a*) 10. H. 4. 7. that wheresoever a constable, or private person, may justify 7. Ed. 4. 20. the arresting another for a felony or treason, he may also 3. Ed. 4. 26, 27. justify the sending or bringing him to THE COMMON GAOL; 20 Ed. 4. 6. and that every private person has as much authority in 10. Ed. 4. 17, cases of this kind as the sheriff or any other officer, and 18. may justify such imprisonment by his (*b*) own authority, 5. H. 7. 4, 5. but not by the command of another. But (*c*) inasmuch as 2. H. 7. 3. it is certain, that a person lawfully making such an arrest 11. Ed. 4. 4. may justify bringing the party to the constable, in order to 10. Ed. 4. 7. be carried by him before a justice of peace, inasmuch as the 4, 5. statutes of 1. & 2. Ph. and Mary, c. 13. and 2. & 3. Ph. 2. Hale 81. and Mary, c. 10. which direct in what manner persons F. F. Imprif. 3. brought before a justice of peace for felony shall be examined 11. Ed. 4. 4. by him in order to their being committed or bailed, seem 10. Ed. 4. 17. clearly to suppose, that all such persons are to be brought Summary 91. before such justice for such purpose; and inasmuch as the 112. statute of 31. Car. 2. commonly called THE HABEAS COR- 2. Hale 120. PUS ACT, seems to suppose, that all persons who are com- 1. Burn's Just. mitted to prison, are there detained by virtue of some war- 369. rant in writing, which seems to be intended of a commit- ment by some magistrate, and the constant tenor of the late books, practice, and opinions, are agreeable hereto; it is Dalt. c. 118. certainly most adviseable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of peace, that he may be committed or bailed by him.

Sec. 4. But it is certain, that the privy council (2) or any one or two of them, or a secretary of state, (3) may

(2) The two cases in Leonard (*vide infra*, Note 4) presuppose some power for this purpose, without saying what; and the case in Anderson plainly recognizes such a power in *high treason*. But as to the jurisdiction of privy councillors in other offences, it does not appear to have been either claimed or exercised. The decisions, however, in the cases of the Queen *v.* Derby, Fortesc. 141. (*infra* 4. 8.) and Rex *v.* Earbury, 8. Modern 177. *infra* 11. (even though it should be admitted that the practice which has subsisted since the Revolution had been erroneous in its commencement), are established; and the Court has no right to overturn them. Lord Camden, 11. State Trials 323.

(3) In Entick *v.* Carrington, C. B. Mich. 6. Geo. 3. upon a special verdict, respecting the validity of a secretary of state's warrant to seize persons and papers in the case of libels, Lord Camden enquired very critically into the source of this power to commit for libels and other state crimes—By the common law, says his Lordship, neither secretaries of state nor privy councillors are conservators of the peace, nor has any statute ever conferred any such jurisdiction upon them. The office neither implies nor requires the authority of a magistrate; nor is it consistent with the wisdom or analogy of our law to give a power to commit without a power to examine upon oath, which to this day the secretary of state doth not presume to exercise. (*Vide* 5. Modern 78.) The king is indeed the principal conservator of the realm; and the secretary appears by some means to have obtained this transfer of the royal authority to himself, but the common law of England knows of no such committing magistrate. 11. St. Tr. 317. 319.

lawfully commit persons for treason, and for other offences against the state, as in all ages (4) they have done.

(4) 1. Howell was committed 28th, and Hellyard 30. Eliz. by secretary Walsingham privy councillor, and it was determined that where the commitment is not by the whole council, the cause must be expressed in the warrant. 1. Leonard 71. 2. Leonard 175. Sed vide 31. Car. 2. c. 2. and Ld. Raym. 65.—2. In 34. Eliz. the judges remonstrate against the exercise of this power, and declare that all prisoners may be discharged unless committed by the queen's command, or by her whole council, or by one or two of them, for *high treason*. 1. And 297.—3. Melvin was committed 4. Car. 1. by secretary Conway, for suspicion of high treason, but the Court thought the cause of the suspicion should have been expressed. Palm. 558.—4. Crofton was committed by the council, 14. Car. 2. for high treason generally. Vaughan 142. 1. Sid. 78. 1. Keble 305.—5. Fitzpatrick was committed by privy council, 7. Will. 3. for high treason in aiding an escape, and bailed for neglect of prosecution. 1. Salk. 103.—6. Yaxley was committed, 5. Will. & Mary, by the earl of Nottingham, secretary of state, for refusing to declare if he was a jesuit. Carth. 291. Skinner 369.—7. Kendal and Roe were committed, 7. Will. 3. by secretary Trumbal, for high treason in assisting the escape of Montgomery, and by Holt C. J. held good, but the prisoners were bailed. 4. State Trials 559. 5. Modern 78. Skinner 596. Holt 144. Ld. Raym. 61. 65. Comb. 343. 12. Modern 82. 1. Salkeld 347.—8. Derby was committed, 10. Anne, for publishing a libel (*Quære* for felony, 11. State Trials 311) called *The Observer*, and the Court held the warrant good and legal. Fortesc. 140. 11. State Trials 309.—9. Sir W. Windham was committed. 4. Geo. 1. by secretary Stanhope, for high treason, and by Parker C. J. held good. Strange 3. 3. Viner 516.—10. Lord Scarisdale and Duplin, and Mr. Harvey of Comb, were committed, 2. Geo. 1. by Lord Townsend, secretary of state, for treasonable practices, and admitted to bail. 3. Viner 534.—11. Doctor Farbury was arrested and committed by warrant from the secretary of state, for being the author of a seditious libel, and his papers seized, and he was continued on his recognizance, 7. Geo. 2. 8. Mod. 177. 11. State Trials 309.—12. Florence Hensley was committed, 31. Geo. 2. by the earl of Holderness, secretary of state, for high treason in adhering to the king's enemies. 1. Burr. 642.—13. Doctor Shebbeare was committed, 31. Geo. 2. on two warrants from the secretary of state, for a libel. 1. Burr. 460.—14. John Wilkes, esq. was committed, 3. Geo. 3. by warrant from the earl of Halifax, secretary of state, for a libel; but being a member of parliament, he was protected by his privilege, and on that account discharged. 2. Wilfon 150. 11. State Trials 302.—15. Sayer was apprehended, 8. Geo. 3. by warrant from the earl of Rochford, secretary of state, for high treason, and bailed by Lord Mansfield. Black. 1165. Vide the case of Entick v. Carrington, upon a special verdict, for apprehending the plaintiff under the warrant of a secretary of state, for a libel, 11. State Trials 327.

As to THE THIRD POINT, viz. To what prison such offenders are to be committed, I shall observe,

FIRST, That the prison ought to be in the realm of England.

SECONDLY, That regularly it ought to be a common prison.

Stat. 5. As to the first of these particulars, it is enacted by 31. Car. 2. c. 12. "That no subject of this realm, being an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which then were, or at any time hereafter

“ hereafter should be, within or without the dominions of his majesty, his heirs or successors; and that every such imprisonment is by the said statute enacted and adjudged to be illegal; and that every subject so imprisoned shall have an action of false imprisonment, &c. and recover treble costs, and no less damages than five hundred pounds against the person making such warrant, who shall also incur a *præmunire*.”

Sett. 6. As to the second of the above-mentioned particulars, it is enacted by 14. Edw. 3. c. 10. as followeth: “ In the right of the gaols which were wont to be in ward of the sheriffs, and annexed to their bailiwicks; it is assented and accorded, that they shall be rejoined to the sheriffs, and the sheriffs shall have the custody of the same gaols, as before this time they were wont to have; and they shall put in such under-keepers for whom they will answer.” And this is confirmed by 19. Hen. 7. c. 10.

Also it is recited by 5. Hen. 4. c. 10. “ That divers constables of castles within the realm, being assigned justices of peace by the king’s commission, had by colour of such commission used to take people to whom they bore evil will, and imprison them within the said castles, till they had made fine and ransom with the said constables for their deliverance.” And thereupon it is enacted, “ That none be imprisoned by any justice of the peace, but only in the common gaol; saving to lords and others which have gaols their franchise in this case.”

Vide 11. & 12. Will. 3. c. 19. sect. 3. made perpetual by 6. Geo. 1. c. 19. to enable justices of peace to build and repair gaols in their respective counties, where the same clause is enacted.
(a) See 1. And. 345. C. Eliz. 829, 830. 9. Co. 119. Salkeld 343.

Sett. 7. And it (a) seems, that the king’s grant since this statute to private persons to have the custody of prisoners committed by justices of peace, is void. And it is said, that none can claim a prison as a franchise, unless he have also a gaol-delivery.

Forres 31. 2. Ld. Raymond 767. 899.

† And whereas vagrants and other criminals, offenders, and persons charged with small offences, are for such offences, or for want of sureties, to be committed to the county gaol, it being adjudged by law that the justices of the peace cannot commit them to any other prison for safe custody, which by experience hath been found to be very prejudicial and expensive, it is therefore enacted by 6. Geo. 1. c. 19. “ That it shall and may be lawful to and for the justices of the peace within their respective jurisdictions to commit such vagrants and other criminals, offenders, person and persons, either to the common gaol or house of correction, as they in their judgment shall think proper.”

Sett.

Sett. 8. It seems to be (a) agreed, that if a person be arrested in one county, for a crime done in it, and fly into another, and be re-taken there, he may be brought before a justice of the county where the offence was done, and be committed by him to the gaol of such county. But it seems to be the stronger (b) opinion, that if one who hath committed an offence in one county, fly into another before he be taken, and be pursued and arrested in such county, he ought to be brought before a justice of the county where he is taken, and be committed by him to the common gaol of the same county (c), whether it lie in such county or another; (d) unless there be some special reason to the contrary, as an apparent danger that the party may be rescued from such prison by rebels, &c. And it seems to be laid down as a rule, by some books, (e) that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the same county or not.

(a) Summary 93.
 1. Hale 580.
 2. Hale 94.
 115.
 Dalton c. 118.
 Crom. 172,
 173.
 (b) Dalton c. 118.
 Cronpton 72.
 Summary 92,
 93.
 11. E. 4. 4, 5.
 13. E. 4. 8, 9.
 Plowden 37.
 Keilwood 45.
 Con.
 4. Bulst. 264.
 71. E. 4. 7.
 (c) Keilw. 45.
 71. E. 4. 5. (d) 11. Ed. 4. 4, 5. 7. (e) Keilw. 45. 22. Ed. 4. 34.

† By 23. Geo. 2. c. 25. f. 11. and 24. Geo. 2. c. 55. If an offender, against whom a warrant shall be issued by any justice of peace of one county, shall escape into another, he may be apprehended (by virtue of the warrant being indorsed by any justice of the county into which he shall so escape), and bailed in the county in which he is apprehended, if the offence be bailable; if not, or he cannot find bail, he shall be carried back into the county from which the warrant was granted, and be there committed or bailed.

Sett. 9. It is (f) said, that if a constable bring a felon to gaol, and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next gaol-delivery. But (g) in other cases it seems, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously (h) sick that it would apparently hazard his life to send him to the gaol, (i) or there be evident danger of a rescue from rebels, &c. Yet constant practice seems to authorize a commitment to a messenger; and it is (k) said, that it shall be intended to have been made in order for the carrying of the party to gaol.

(f) Sum. 114.
 10. H. 4. 7.
 F. Escape, 8.
 Dalton c. 118.
 B. F. Imprison. 25.
 (g) 2. Hale 123.
 20. Ed. 4. 6.
 B. F. Imprison. 21. 27.
 11. Ed. 4. 7.
 2. Ed. 4. 8.
 (h) 2. Hale 96.
 119, 120.
 (i) 2. Hale 81.
 11. Ed. 4. 4, 5. (k) Salkeld 347. 5. Modern 78. to 85. Skinner 599.

Prisoners not to be removed but by *habeas corpus*, &c.

Sett. 10. As prisoners ought to be committed at first to the proper prison, so ought they not to be removed from thence, except in some special cases. And to this purpose it is enacted by 31. Car. 2. c. 2. f. 9. "That if any sub-
 "ject

“ ject of this realm shall be committed to any prison, or in
 “ custody of any officer or officers whatsoever, for any cri-
 “ minal, or supposed criminal matter; that the said person
 “ shall not be removed from the said prison and custody,
 “ into the custody of any other officer or officers, unless it
 “ be by *habeas corpus*, or some other legal writ; or where
 “ the prisoner is delivered to the constable, or other inferior
 “ officer, to carry such prisoner to some common gaol; or
 “ where any person is sent by order of any judge of assize,
 “ or justice of the peace, to any common workhouse, or
 “ house of correction; or where the prisoner is removed
 “ from one prison or place to another, within the same
 “ county, or ordered to a trial, or discharged by due course
 “ of law; or in case of sudden fire, or infection, or other
 “ necessity; upon pain that he who makes out, signs or
 “ counter signs, or obeys or executes such warrant, shall
 “ forfeit to the party grieved one hundred pounds for the
 “ first offence, two hundred pounds for the second, &c.

As to THE FOURTH POINT, *viz.* What ought to be done
 previous to the commitment of such offenders.

Magistrates
 must take ex-
 aminations in
 writing, &c.

Stat. 11. It is enacted by 2. & 3. Ph. and Mary, c. 10.
 “ That every justice or justices before whom any person shall
 “ be brought for manslaughter or felony, or for suspicion
 “ thereof, before he or they shall commit or send such
 “ prisoner to ward, shall take the examination of such pri-
 “ soner, and information of those that bring him, of the
 “ fact and circumstances thereof; and the same, or as much
 “ thereof as shall be material to prove the felony, shall put
 “ in writing within two days after the said examination,
 “ and the same shall certify in such manner and form, and
 “ at such time, as they should and ought to do, if such pri-
 “ soner, so committed or sent to ward, had been bailed,
 “ or let to mainprize; upon such pain as in 1. & 2. Ph.
 “ and Mary, c. 13. is limited and appointed for not tak-
 “ ing or not certifying such examinations, &c.”

*Viz. fine at
 the discretion
 of the justices
 of gaol deli-
 very. Ante
 p. 105.*

And it is farther enacted, “ That the said justices shall
 “ have authority to bind all such by recognizance or obliga-
 “ tion as do declare any thing material to prove the said
 “ manslaughter or felony, to appear at the next general
 “ gaol delivery to be holden within the county, city, or
 “ town corporate, where the trial of the said manslaughter
 “ or felony shall be, then and there to give evidence against
 “ the party; and that the said justices shall certify the said
 “ bonds taken before them, in like manner as they ought
 “ to certify the bonds mentioned in the said former act,
 “ &c.”

Stat.

C. Eliz. 829, 830. *Seft.* 12. It seems that a justice of peace ought not to detain a prisoner by virtue of this statute, in order to examine him, any longer than is necessary for such purpose, for which it is said that the space of three days is a reasonable time.

1. Hale 586.
2. Hale 120, 121.

As to THE FIFTH POINT, *viz.* What ought to be the form of a commitment, the following rules are to be observed.

2. Inst. 52. *Seft.* 13. FIRST, It must be in writing, under the hand and seal of the person by whom it is made, and expressing his office, or authority, and the time and place at which it is made, and must be directed to the gaoler, or the keeper of the prison.

591.
2. Hale 122.
Dalton c. 125.
1. Hale 157.
577.
Summary 94.
5. Burrow 2686.

Dalton c. 125. *Seft.* 14. SECONDLY, It may be made either in the name of the king, and only *issued* by the person who makes it, or it may be made by such person in his own name.

Seft. 15. THIRDLY, It may command the gaoler to keep the party in safe and close custody (*a*); for if every gaoler be bound (*b*) by the law to keep his prisoner in such custody, surely it can be no fault in a *mittimus* to command him so to do.

(*a*) Windham's Case, Strange 3. where these words were held admonitory to the officer, to put him in mind of his duty and punishment in case of an escape.

(*b*) 8. Co. 100. 9. Co. 87. 5. Modern 21. Dalton c. 118.

Seft. 16. FOURTHLY, It ought to set forth the crime alleged against the party with convenient (*c*) certainty, whether the commitment be by the privy (*d*) council, or any other authority; otherwise the officer (*e*) is not punishable, by reason of such *mittimus*, for suffering the party to escape; and the Court before whom he is removed by *habeas corpus*, ought to discharge or bail him. And this doth not only hold where (*f*) no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the Court cannot adjudge whether it were a reasonable ground of imprisonment; as (*g*) where one was committed for manifold contumacy to the high commission court, or for (*h*) refusing to answer before them to certain articles, or (*i*) for insolent behaviour and words spoken at the council-table, &c. And it is holden by Sir (*k*) Edward Coke, in his Second Institute, that a commitment for high treason, or felony in

(*a*) Sum. 94.
Dalton c. 125.
2. Inst. 52.
591.
Strange 934.
(*d*) 16. Car. 1.
c. 10.
C. Car. 133.
507. 579. 593.
2. And. 298.
Con.
1. Roll. 134.
1. L. con. 71.
c. 15. *seft.* 66.
to 73.
Vide Money v. Leach, 1. Black. 561.
(*e*) 2. Inst. 591. Summary 109. Infra c. 17. Palm. 558. (*f*) C. Car. 507. 579. 593. Barkham & Lawton, Palm. 558. (*g*) 1. Roll. 245. (*h*) 1. Roll. 220. 245. (*i*) C. Car. 133. 579. 2. Bullst. 139. 140. (*k*) 2. Inst. 591. 5. Modern 85. 1. Burn 155.

general,

general, without shewing the species of the offence, is not good: Yet in (a) another part of the same book, such general commitments seem to be allowed by him to be good; and there are precedents of commitments for felony in general, in good (b) authors. And (c) it hath been resolved, that commitments for *high treason* in general are good.

necessary to state on a warrant of commitment on a charge of felony that the act was done *feloniously*, yet unless it sufficiently appear to the Court that a felony has been committed, they are bound to bail the defendant. *Rex v. Judd*, 2. Term Rep. 235. (c) 1. Sid. 78. 1. And. 298. 1. Keble 305. Palm. 558. Strange 2. 10. Modern 234. 1. Hale 595. 2. Hale 123. confirmed by Pratt, C. J. in *Wilkes' Case*, 2. Wilson 158.

Seet. 17. FIFTHLY, It is safe to set forth, that the party is charged upon oath; but this is not necessary; for it hath been resolved, (5) that a commitment for treason, or for suspicion of it, without setting forth any particular accusation, or ground of the suspicion, is good.

mitted by the secretary of state for high treason generally. *Strange* 2. and 3. *Viner's Abr.* 515. at large. It is confirmed by Pratt C. J. 3. *Geo.* 3. in *Mr. Wilkes' Case*, committed by a similar warrant for a libel. 2. *Wilson* 158. 11. *State Trials* 304; and Mr. Justice Foster says, in cases wherein *the justice of the peace hath jurisdiction*, the legality of his warrant will never depend on the truth of the information whereon it is grounded. *Curtis's Case* 136.—See also *Dalton* c. 125. *Crompt.* 233. 2. *Inf.* 52. *Palmer* 558. 1. *Salkeld* 347. 5. *Modern* 78. 10. *Modern* 334. 1. *Hale* 582.

Seet. 18. SIXTHLY, Every such *mittimus* ought to have (d) 2. *Inf.* a lawful conclusion, (d) *viz.* That the party be safely kept till he be delivered by law, or by order of law, or by due course of law:—Or that he be kept till farther (e) order (which shall be intended of the order of law), or to the like effect. And if the party be committed only for want of bail, it seems (f) to be a good conclusion of the commitment, that he be kept till he find bail. But a commitment (g) till the person who makes it shall take further order, seems not to be good. And it seems, that the party committed by such, or any other irregular *mittimus*, may be bailed.

1. *Roll.* 220. 1. *Lev.* 230. *Cro. Car.* 579. con. 3. *Bulst.* 43, 49. 1. *Roll.* 420. *Vide* also 3. *Keble* 531. 2. *Ld. Raym.* 851 978. 3. *Salkeld* 91. *Holt* 590. *Carth.* 152. 291. *Salkeld* 48. 343. *Ld. Raymond* 99. 1453. 200. 213. 323. *Comber.* 370. 3. *Com. Dig.* 496. *Strange* 1005. 917. 5. *Modern* 308. 1. *Bac. Abr.* 382. *Set. & Rem.* 236. 2. *Black. Rep.* 805. *Sayer* 44.—N. B. Commitments grounded upon acts of parliament must pursue the conclusions which the statutes prescribe:—And where a man is committed as a criminal, the conclusion must be “until he be delivered by due course of law;” if he be committed for contumacy, it should be “until he comply.”

As to THE SIXTH POINT, *viz.* At whose charge offenders are to be sent to prison.

Seet. 19. It is enacted by 3. Jac. 1. c. 10. “That every person and persons, that shall be committed to the com-
“men

" mon or usual gaol within any county or liberty within
 " this realm, by any justice or justices of the peace,
 " for any offence or misdemeanor, having means or abi-
 " lity thereunto, shall bear their own reasonable charges;
 " for so conveying or sending them to the said gaol,
 " and the charges also of such as shall be appointed to
 " guard them to such gaol, and shall so guard them
 " thither. And if any such person or persons so to be
 " committed, shall refuse at the time of their commitment
 " and sending to the said gaol, to defray the said charges;
 " or shall not then pay or bear the same, then such jus-
 " tice or justices of the peace shall and may by writing
 " under his or their hand and seal, or hands and seals, give
 " warrant to the constable or constables of the hundred, or
 " constable or tythingman of the tything or township where
 " such person or persons shall be dwelling and inhabit, or
 " from whence he or they shall be committed, or where he
 " or they shall have any goods within the county or liberty,
 " to sell such, and so much of the goods and chattels of the
 " said persons, as by the discretion of the said justice or
 " justices of the peace shall satisfy and pay the charges of
 " such his or their conveying or sending to the said gaol;
 " the appraisement to be made by four of the honest inhabi-
 " tants of the parish or tything where such goods or chat-
 " tels shall remain and be; and the overplus of the money
 " which shall be made thereof, to be delivered to the party
 " to whom the said goods shall belong."

The second
 sect. of the a-
 bove act of 3.
 Jac. 1. c. 10.
 which was
 here recited in
 the former
 edition of this
 work, is re-
 pealed by 27.
 Geo. 2. c. 3.
 sect. 2.

Vide ante 91.
 1. Burn's Jus-
 tice 374.

Stat. 20. And it is further enacted by 27. Geo. 2. c. 3.
 f. 1. " That when any person not having goods or money
 " within the county where he is taken, sufficient to bear the
 " charges of himself, and of those who convey him, is
 " committed to gaol or the house of correction by warrant
 " from any justice of the peace, then on application by any
 " constable or other officer who conveyed him, any jus-
 " tice of the peace for the same county or place shall upon
 " oath examine into and ascertain the reasonable expences
 " to be allowed such constable or other officer, and shall
 " forthwith, without fee or reward, by warrant under his
 " hand and seal, order the treasurer of the county or place to
 " pay the same; which the said treasurer is hereby required
 " to do as soon as he receives such warrant; and any sum so
 " paid shall be allowed in his accounts. Except in Middle-
 " sex, in which county the expences of the constable or
 " other officer occasioned by his conveying any person to
 " gaol by virtue of a warrant from a justice of the peace
 " shall (after such expences have been examined into upon
 " oath, and allowed by such justice, and for which no fee
 " or reward shall be taken) be paid by the overseer or over-
 " seers

“seers of the poor of the parish or place where the person
“was apprehended.”

As to THE SEVENTH POINT, *viz.* To what court such commitments are to be certified.

Sec. 21. It is enacted by 3. Hen. 7. c. 3. “That every
“sheriff, bailiff of franchise, and every other person, hav-
“ing authority or power of keeping of gaol, or of prisoners
“for felony, do certify the names of every such prisoner in
“their keeping, and of every prisoner to them committed
“for any such cause, at the next general gaol-delivery, in
“every county or franchise where any such gaol shall be,
“there to be calendared before the justices of the deliverance
“of the same gaol, whereby they may, as well for the king
“as for the party, proceed to make deliverance of such pri-
“soners according to law; on pain to forfeit to the king
“for every default there recorded, one hundred shillings.”

As to THE EIGHTH POINT, *viz.* By what means a per-
son under such a commitment may be discharged.

Sec. 22. It seems, that a person legally committed for a
crime, certainly appearing to have been done by some one or
other, cannot be lawfully discharged by any one but by the
king, till he be acquitted on his trial, or have an *ignora-*
-mus found by the grand jury, or none to prosecute him, on
a proclamation for that purpose by the justices of gaol-del-
ivery. Keilwood 34.
3. Inst. 209,
210.
Sum. 94, 95.
114.
1. Hale 582.

Sec. 23. But if a person be committed on a bare sus-
picion, without any appeal or indictment, for a supposed
crime, where afterwards it appears that there was none, as
for the murder of a person thought to be dead, who after-
wards is found to be alive; it hath been holden, that he
may be safely dismissed without any farther proceeding, for
that he who suffers him to escape is properly punishable
only as an accessory to his supposed offence; and it is im-
possible that there should be an accessory where there can be
no principal; and it would be hard to punish one for a con-
tempt, in disregarding a commitment founded on a suspicion,
appearing in so uncontested a manner to be groundless,

CHAPTER THE SEVENTEENTH.

OF HINDRANCES IN BRINGING OFFENDERS
TO
PUBLICK JUSTICE, &c.

HAVING shewn in what manner criminals are to be *arrested, bailed, or committed*, I am now to consider in what manner they and their assistants are punishable for an hindrance in bringing them to publick justice.

And in order hereto I shall examine,

1. How far they are punishable for an offence of this kind before an arrest made.

2. How far after an arrest made.

As to THE FIRST POINT, *viz.* How far persons and their assistants are punishable for hindering offenders being brought to publick justice.

(a) Sum. 116. *Seet.* 1. It is (a) certainly an offence of a very high nature to oppose one who lawfully endeavours to arrest another (b) S.P.C. 31. Crompton 38. for *treason*, or *felony*. And some (b) have said, that the person who so opposes an arrest for *treason*, whereof he knows 26. Aflize 47. the party to have been guilty, is thereby guilty of the *treason*; and that he who so opposes an arrest for *felony*, is an F. Just. of accessory to the felony. And if it be a general (c) rule, that Peace, 114. 231. whoever, knowing a person to have committed any such Con. Sum. 116. crime, receives and comforts him, and endeavours to favour 1. Hale 606. and aid him in the making his escape, thereby becomes F. Cor. 333. a principal in the case of *treason*, and an accessory in the 2. Inst. 590. case of *felony*, though he use no force in giving such assistance to the offender, it seems strange that he who so far (c) Sum. 218, 219. takes part with him as to fight in his defence from justice, 2. Inst. 183. should not be at least equally guilty. And therefore it seems Moor 8. reasonable to understand the books above cited, which seem S. P. C. 41. to contradict this opinion, to intend no more than that it is not felony in the party himself, who is attacked in order to be arrested, to save himself from the arrest by such resistance. S. P. C. 32. 9. H. 4. 1. 26. Aflize 47.

Seet. 2. But if a person, knowing another to have been guilty of such a crime, barely receive him, and permit him to escape, without giving him any manner of advice, assistance, or encouragement in it, as by directing him how to do it in the safest manner, or furnishing him with money, provisions,

Sum. 111. 271.

provisions, or other necessities, it seems he is guilty of a *high misdemeanor* only, but no capital offence.

Seet. 3. Also it is certain, that the party himself who flies from such an arrest, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him, in such manner as hath been already shewn, chapter 9. sect. 51. and shall be also more fully considered hereafter.

Seet. 4. How far a vill, which suffers one who has been guilty of homicide to escape, is liable to be amerced, hath been already shewn, chap. 12. sect. 2, 3.

AS TO THE SECOND POINT, *viz.* OFFENCES of this kind, after an arrest made, may be considered in relation either, To the party under such an arrest : or, To others—And such offences by the party himself are either without or with force.

Seet. 5. AND FIRST, As to such offences by the party himself, without force, which seem properly to come under the notion of escapes, there is little remarkable in the books; and therefore I shall content myself with taking notice, that as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, whoever, in any case, refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of a *high contempt*, punishable with fine and imprisonment. Summary 108.
2. Inst. 589.
590.
C. Car. 210.

AND SECONDLY, If it be so great a crime for one not arrested to fly, in order to save himself from imprisonment for a capital offence, surely it must be at least as great a crime for one who is actually under the custody of the law for any such crime, by any indirect means to free himself from it. And some (a) have holden, that such an escape amounts to felony: But this opinion seems to be over severe, and not to be maintained by the (b) book cited to prove it. 1. Affize 6.
(a) S.P.C. 31.
(b) 2. Ed. 3. 2.
F. Cor. 149.

CHAPTER THE EIGHTEENTH.

OF

BREAKING PRISON.

SUCH offences by the party himself, accompanied with force, come under the notion of prison-breaches; which I shall consider,

1. As they stand by the common law.

2. On the statute *de frangentibus prisonam*, which was made in the first year of king *Edward the second*.

AND FIRST as to prison-breaches, as they stood by the common law.

Scit. 1. It seems to be the better opinion, (a) that all such offences were felonies, if the party were lawfully in prison for any cause whatsoever, whether criminal or civil, and whether he were actually in the walls of a prison, or only in THE STOCKS, or in the custody of any person who had lawfully arrested him; and it seems not to have been any way material whether the prison did belong to the king, or to the lord of a franchise; not only for that every person who is under a lawful imprisonment may properly enough be called the king's prisoner, but also because it is allowed, (b) that whoever breaks from any such imprisonment, since the statute 1. Edw. 2. *de frangentibus prisonam*, is guilty of felony: From whence it seems clearly to follow, that he must have been in like manner guilty before that statute, the purport whereof is not to make any offences felonies which were not so before; but only to restrain some of those which were. And it (c) seems also to be clear, that the confession of such offence before the coroner is not traversable by the common law; which is not altered as to this point by the statute.

(a) Braet. l. 3. c. 9.
Britten f. 17.
S. P. C. 30.
2. Inst. 589.
Summary § 7.
1. Hale 607.
Cont.
S. P. C. 31. 33.
1. H. 7. 6.
B. Corone 130.
C. Car. 210.
2. Inst. 589.
(b) Vide infra f. 4.
(c) Vide supra c. §. f. 49.

Scit. 2. **AND** now I am to consider these offences, as they stand by the said statute: For the better understanding whereof I shall first set down the words of the statute, and then endeavour to shew in what manner they are to be understood.

Scit.

Ch. 18. OF BREAKING PRISON.

Sett. 3. And first, the words of the statute are as follows: "*De prisonariis prisonam frangentibus dominus rex vult*²
" et præcipit, quod nullus de cætero, qui prisonam fregerit,
" subeat judicium vitæ vel membrorum pro fractione prisonæ
" tantum, nisi causa, pro qua captus et imprisonatus fuerit,
" tale judicium requirat, si de illa secundum legem et consuetu-
" dinem terræ fuisset convictus, licet temporibus præteritis aliter
" fieri consuevit."

For the better understanding of the construction whereof, I shall consider the following points :

1. What shall be said to be A PRISON, within the meaning of this statute.

2. How far the imprisonment ought to be well grounded.

3. What shall be said to be a breaking of prison.

4. For what crime the party ought to be imprisoned, to make the offence of breaking the prison felony within the intent of the statute.

5. Whether the offence of breaking prison can ever amount to high treason.

6. At what time, and in what manner, the offender is to be proceeded against.

7. In what manner he is to be indicted.

8. In what manner those are to be punished for a breach of prison, who are within the benefit of the statute.

AS TO THE FIRST POINT, *viz.* What shall be said to be a prison (a) within the meaning of the statute.

48. 164. 250. 419. 22. Affize 85. C. Cas. 210. 2. Inst. 589, 590.
 2. Hale 608. 610. Dyer 99. Crom. 38, 39.

(a) F. Cor.
 158. 290. 314.
 Summ. 107.

Sett. 4. It seems clear, that any place whatsoever where-
 in a person under a lawful arrest for a supposed crime is re-
 strained of his liberty, whether in the stocks, or the street, or in
 the common gaol, or the house of a constable or private
 person, or the prison of the ordinary, is properly a prison
 within the statute ; for imprisonment (b) is nothing else (b) S.P.C. 30.
 but a restraint of liberty.

AS TO THE SECOND POINT, *viz.* How far the imprisonment ought to be well grounded.

Sec. 5. It is clear, (*a*) that if a person be taken upon a *capias* awarded on an indictment or appeal against him, for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were in truth committed by him, or any other person, or not; for that there is an accusation against him on record, which makes his commitment lawful, be he never so innocent, and the prosecution never so groundless.

Sec. 6. Also if an innocent person be committed by a lawful *mittimus* on such a suspicion of a felony, actually done by some other, as will justify his imprisonment though he be neither indicted nor appealed, he is certainly (*b*) within the statute if he break the prison, for that he was legally in custody, and ought to have submitted to it till he had been discharged by due course of law.

(*d*) Sum. 109.
1. Hale 610, 611.
2. Inst. 590.
Dyer 99. Crompton 38.

Sec. 7. But if no (*c*) felony at all were done, and the party be neither indicted nor appealed, it seems clear, that no *mittimus* for such a supposed crime will make him guilty within the statute by breaking the prison, for that his imprisonment was unjustifiable. ✓

(*c*) Sum. 109.
2. Inst. 590.
591. Con.
2. Leon. 166.

Sec. 8. Also if a felony were done, yet if there were no just cause of suspicion, either to arrest or commit the party, it seems clear, that if his *mittimus* be not in such form (*d*) as the law requires, his breaking of the prison cannot be felony, because the lawfulness of his imprisonment in such case depends wholly on the *mittimus*; which if it be not according to law, the imprisonment will have nothing to support it. But if the party were taken up for such strong (*e*) causes of suspicion as will be a good justification both of his arrest and commitment, but happen to be committed by an informal warrant, it seems that it may be probably argued, that it will be felony (*f*) in him to break the prison; for if, by the ancient common law, any private person might, of his own authority, justify both an arrest and commitment, for treason or felony, on a reasonable cause of suspicion, as it seems probable (*g*) from the tenor of all the old books that he might; and if the necessity of a *mittimus* (*h*) from a magistrate depend rather on the constant settled practice of justices of peace than any direct law, it seems difficult to maintain that a slip in want of form of such a *mittimus* should make it lawful for the prisoner to break the prison,

(*d*) Vide c. 16.
f. 13, 14, 15,
16, 17, 18.

(*e*) Vide sup.
c. 12. f. 8, 9.
&c.

(*f*) B. Escape,
29.
42. Affize 5.
1. Hale 609.

(*g*) Vide sup.
c. 12. & c. 18.
f. 3.

(*h*) 5. Mod. 80.

prison; whereas, by the old law, it would have been felony in such a case to have broken it without any such *mittimus* at all. And on the other side, if the party be taken up for such slight causes of suspicion of a felony actually done, as will not in strictness justify the arrest, yet if the justice, before whom he is brought, think them of such weight as to require a commitment, and do accordingly send the party to gaol by a regular *mittimus*, it seems very dangerous for him to break the prison; for the practice of justices of peace in making such commitments, being now grown into settled law, it seems reasonable, that their *mittimus* be a good justification of the imprisonment which it commands, for a crime within their jurisdiction regularly brought before them; from whence it follows, that to break from such imprisonment must be unlawful. And therefore, since it doth not appear that there hath been any direct resolution of these points, perhaps it may be reasonable to understand, what is more generally said by Sir (a) Edward Coke, and Sir (b) Matthew Hale, in relation to this matter, according to the above-mentioned distinctions.

Vide inf. f. 15.

(a) 2. Inst.

391.

(b) SUMM.

109.

1. Hale 609. 2. Hale 610.

As to THE THIRD POINT, viz. What shall be said to be a breaking of prison within the meaning of this statute, the following rules are to be observed.

SECT. 9. FIRST, There must be an actual (c) breaking; for every indictment for this offence, as a felony, must have the words "*felonice fregit prisonam*," which seem necessarily to import the use of some real force or violence, and not such only as may be implied by the construction of law, in any act done in contempt of it; and therefore, if without any obstruction a prisoner go out of the prison doors, being opened by the consent or negligence of the gaoler, or otherwise escape without using any kind of force or violence, he is guilty of a misdemeanor only, but not of felony, and the gaoler is punishable in such manner as shall be set forth more at large in the next chapter.

(c) 2. Inst. 590.

Summary 108.

S. P. C. 31.

Rex v. Burr.

3. P. Will. 439.

1. Hale 611.

SECT. 10. SECONDLY, Such breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison be broken by others, without his procurement or consent, and he escape through the breach so made, it seems the better (d) opinion, that he cannot be indicted for the breaking, but only for the escape.

(d) 2. Inst.

589.

Summary 108.

S. P. C. 30.

31.

1. Hale 611. F. Corone 48.

2. H. 7. 6.

SECT. 11. THIRDLY, Such breaking must not be necessitated by an inevitable accident happening without any fault of the prisoner; as where (a) the prison is fired by lightning, or otherwise, without his privity, and he breaks it open & save his life.

(a) 15-H. 7.
1, 2.
Plowden 136.
2. Inst. 590.
Summary 108. 1. Hale 611.

SECT. 12. FOURTHLY, It seems, that no breach of prison will amount to felony, unless the prisoner escape. For if the breaking of a prison by a stranger, in order to free the prisoners who are in it, be not felony, unless the prisoners go out of it, as it is said (b) that it is not, it seems *a fortiori*, that such a breach by the prisoner himself, who lies under so much stronger a temptation to it, cannot be felony unless he do escape.

(b) Keilw. 48.

As to THE FOURTH POINT, *viz.* For what crime the party must be imprisoned, to make his breaking the prison felony within the meaning of the statute, the following rules are to be observed.

SECT. 13. FIRST, It is not material, whether the offence for which he was imprisoned were capital at the time of this statute, or were made so by subsequent statutes; for since all breaches of prison were felonies by the common law which is restrained by the statute in respect only of imprisonment for offences not capital; when an offence becomes capital, it is as much out of the benefit of the statute, as if it had always been so.

Summary 108.
1. Hale 611.

SECT. 14. SECONDLY, The offence for which the party was imprisoned must be a capital one at the time of the offence, and not become such by matter subsequent; as where (c) A. is committed to a prison for a dangerous wound given to B. and breaks the prison, and then B. dies: For though to some intents such offence be esteemed capital from the time of the first act, yet inasmuch as it was in truth but a trespass at the time of the breaking of the prison, and it was then uncertain whether it would ever become capital, and it becomes such afterwards *ab initio*, by fiction only, for some special purposes; and fictions of law are never carried farther than the necessity of those particular cases, which were the cause of the inventing them, doth require, they shall never be construed to exempt a person from the advantage of a beneficial law made in favour of life, who is clearly within the letter, and doth not plainly appear to be out of the meaning of it. However it seems certain, that such an offender breaking prison, while it is uncertain

(c) Summ.
108. 219.
2. Inst. 591.
Plow. 258. 401.
11. H. 4. 12.
8. P. C. 33.
1. Hale 427.
591.

uncertain whether his offence will become capital, is highly punishable for his contempt by fine and imprisonment. 11. H. 4. 12.
S. P. C. 35.

Self. 15. THIRDLY, If the party be only arrested for, and in his *mittimus* charged with a crime which does not require judgment of life or member, as petit larceny or homicide *se defendendo*, or by misadventure, and the offence, in truth, be no greater than the *mittimus* doth suppose it to be, it is clear, from the express words of the statute, that a breaking of the prison cannot amount to felony. And if the offence for which the party is committed, be supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if in the event it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain, that the breaking of the prison on a commitment for it can be felony; for the words of the statute are, "*nisi causa pro qua captus et imprisonatus fuerit, tale judicium requirit*;" and here it appears, that the offence, which is the cause of his imprisonment, doth not require such a judgment; and it is hard to say, that a mistake of the nature of the crime, by the person who makes the arrest or *mittimus*, should so far prejudice the party, as to make his escape amount to felony by reason of such mistake, which otherwise would have been but a trespass.

1. Hale 609.
Summary 110.
2. Inst. 390,

Also it seems to be agreed, that if a person be committed for a supposed felony, where no felony hath been done, he is not guilty of felony for breaking the prison; from whence it clearly appears, that in that case the law doth not so far regard the charge contained in the *mittimus*, where there is no good ground to support it, as in respect thereof to exclude the party from the benefit of the statute; and yet in that case the party is as much accused of a capital offence, as in the case in question; so that it is clear, that the law doth not so much respect the heinousness of the charge against the party, as of the very crime which is the subject of the charge: And this will farther appear, if it be considered, that the accusation cannot be said to be the cause which requires judgment of life or member, but the offence which supports the accusation; and if there be no such offence, there is, in truth, no cause which requires such a judgment.

On the other side, if the offence, which was the cause of the commitment, be in truth of such a nature as requires a capital judgment, but in the *mittimus* be supposed to be of an inferior degree, it may probably be argued, that the party's breaking of the prison is felony within the meaning

of the statute; for the cause of his arrest and commitment is the fact for which he was arrested and committed, and that does in truth require judgment of life, though the nature of it be mistaken in the *mittimus*, which does no way alter the judgment of law in relation of the guilt of it. But there appearing no express resolution of these points, and the (a) authors who have expounded this statute seeming rather to incline to a different opinion, I shall leave these matters to the judgment of the reader.

(a) 2. Inst.
590, 591.
Summary
109, 110.
1. Hale 609.

5. P. C. 32.

See B. 1. c. 32.
sect. 2, 3, 4.

SECT. 16. FOURTHLY, It is not material, Whether the party who breaks his prison were under an accusation only, or actually attainted of the crime charged against him; and yet the words of the statute are, "*si causa tale iudicium requirit*." And it cannot be properly said, that the offence of one attainted doth require such a judgment (for that there ought not to be a second judgment against one already condemned), but only that it did require it; and it is a settled rule, that all statutes are to be construed strictly in favour of life, and that no parallel case, which comes within the same mischief, shall be construed to be within the purview of it, unless it can be brought within the meaning of the words. Yet considering that the manifest purport and meaning of the words of the statute, taken all together, is no more than this, that the breaking of prison shall not be a capital offence, unless the crime for which the party was in prison be also a capital offence; and it is frequent, in the construction of penal laws, to bring persons within the purview of them by being within the meaning of the words, though not in strict grammar properly within the very letter; and it would be extremely harsh to imagine, that the makers of the statute could intend a greater favour to persons appearing to be guilty, and actually under the condemnation of the law, than to persons under an accusation only; there can be no doubt but that the persons attainted, breaking prison, are as much guilty within the meaning of the above mentioned exception as any others.

As to THE FIFTH POINT, *viz.* Whether the offence of breaking prison can ever amount to high treason.

SECT. 17. It seems clear, that a person committed for high treason becomes guilty of felony only, and not of high treason, by breaking the prison and escaping singly, without letting out any other prisoner, for that no offence is to be construed high treason, which is not either within the purview of 25. Edw. 3. or of some subsequent statute relating to treason. But if other persons committed also

B. 1, c. 17.
sect. 2.
2. Inst. 590.
5. P. C. 32.
1. H. 6. 5.
2. Hale 137.
Summary 103.

for

for high treason escape together with him, and his intention in breaking the prison were to favour their escape as well as his own, he seems to be guilty of high treason in respect of their escape, for that there are no accessaries in high treason, and such assistance given to persons committed for felony, will make him who gives it an accessary to the felony, and by the same reason a principal in the case of high treasons. But this offence coming more properly under the notion of *rescous* than of the *breaking of prison*, shall be more fully considered in the chapter concerning rescous.

As to THE SIXTH POINT, *viz.* At what time, and in what manner, the offender is to be proceeded against.

Sec. 18. It is said, that he may be arraigned for this offence before he is convicted of the crime for which he was imprisoned, for that it is not material whether he were guilty of such crime or not: neither is he punishable as an accessary in respect thereof, but as a principal offender in respect of the breach of prison itself. On which account this case differs from that of a rescous or voluntary escape; as shall be shewn more at large in the following chapter.

1. Hale 611.
Summary 110.
116.
2. Inst. 502.
2. Hale 244.
254.

Sec. 19. It seems clear, that the sheriff's return of a F. Indict. 30th breach of prison, is not a sufficient ground to arraign the prisoner for it, unless he be also indicted.

1. H. 7. 6.

As to THE SEVENTH POINT, *viz.* In what manner an offender is to be indicted for a breach of prison.

Sec. 20. It is certain, that every indictment of this kind, to bring the offender within the intention of this statute, must specially set forth his case in such a manner that it may appear that he was lawfully in prison, and for such a crime as requires judgment of life or member; and that it is not sufficient to say in general, "*quod felonice fregit prisonam.*" And it seems, that the same rules which are required for an indictment of an escape, set forth at large in the next chapter, are generally to be observed in indictments of breaking prison.

Summary 1.
2. Inst. 59.
F. Indict. 18.

As to THE EIGHTH POINT, *viz.* In what manner those are to be punished who are within the benefit of the statute, by being freed from that severe judgment for the breach of prison, to which by the common law they would have been liable:

B. 1. c. 20. f.
1. & c. 59. f. 1.
Summary 116.
S. P. C. 35.
11. H. 4. 12.

Sec. 21. There seems to be no doubt, but that whoever breaks from any lawful imprisonment is still punishable as for a high misprision by fine and imprisonment, for that every capital offence doth include in it a misprision and may be proceeded against as such only, if the king please; and it cannot be thought the meaning of the statute, in ordaining that such offences shall not be punished as Capital ones, to intend that they shall not be punished at all.

CHAPTER THE NINETEENTH.

OF ESCAPES

SUFFERED

By OFFICERS.

HAVING shewn, in the precedent chapters, how far the party himself, under a lawful arrest for a crime charged against him, is punishable for unlawfully freeing himself from such arrest, without waiting for his deliverance by due course of law, I shall now, in the second place, consider offences of this kind in relation to others.

AND FIRST, Such as are without force.

SECONDLY, Such as are accompanied with force.

Such offences without force come under the notion of escapes, which are either, 1. By *Officers*, Or, 2. By *private persons*.

As to ESCAPES suffered by officers, I shall endeavour to shew the following particulars.

1. What shall be adjudged an escape.
2. Where such escape is to be esteemed voluntary, and where negligent,
3. Where the prisoner may be re-taken after an escape.
4. Whether the escape is excused by such a re-taking; or by killing the prisoner, if he cannot be re-taken.
5. In what manner the officer suffering an escape is to be indicted.
6. How an escape is to be tried and adjudged.
7. How a voluntary escape is to be punished.
8. How a negligent one.

AS TO THE FIRST POINT, *viz.* What shall be judged an escape, the following rules are to be observed.

Señ. 1. FIRST, There must be an actual arrest; and therefore, If (a) an officer having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape.

Señ. 2. SECONDLY, As there must be an actual arrest, such arrest must (b) also be justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular *mittimus* as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape by suffering the prisoner to go at large: And it seems to be a good general rule, that wherever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape.

Señ. 3. THIRDLY, As the imprisonment must be justifiable, so must it be also for a criminal matter; and some (c) are said to have holden, that no escape is criminal, but where the commitment is for felony. However it is certain, that the escape of one committed for petit larceny (d) only is criminal: And it seems most agreeable to the general reason of the law, that the escape of a person committed for any other crime whatsoever should also be criminal: For surely wherever the publick justice requires that a person be committed for a crime, it likewise requires that he be safely kept under such commitment, and consequently may reasonably demand publick satisfaction from the officer to whose custody he is committed, if he neglect to keep him as he ought.

Señ. 4. FOURTHLY, As the imprisonment must be justifiable, and for some crime, so must its continuance at the time of the escape be grounded on that satisfaction which the publick justice demands for such crime; for if a prisoner be acquitted, (e) and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were, that he be discharged "paying his fees;" so that till they be paid, the first imprisonment continued lawful, as before; for inasmuch as he is detained not as a criminal, but only as a debtor, his escape cannot be more criminal than that of

of any other debtor. Yet if a person convicted of a crime be condemned to imprisonment for a certain time, and also till he pay his fees, and he escape after such time is elapsed without paying them, perhaps such escape may be criminal, for that it was part of the punishment, that the imprisonment be continued till the fees should be paid. But it seems, that this is to be intended where the fees are due to others as well as to the gaoler, for otherwise the gaoler will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release.

See F. Cor.
430.
S. P. C. 34.

SECT. 5. FIFTHLY, It is an escape, in some cases, to suffer a prisoner to have greater liberty than by the law he ought to have; as to admit a person to bail, (a) who by law ought not to be bailed, but to be kept in close custody; or to permit (b) a prisoner to go out of the limits of the prison: Yet some (c) seem to have holden, that in this last case it shall not be adjudged an escape, unless the prisoner be found to have had an intention to escape; but it will be difficult to maintain, that the offence of the gaoler can depend on the intention of the prisoner.

(a) 25 E. 3. 39.
1. Hale 596,
597.
Summary 113.
F. Escape 4.
F. Cor. 246.
(b) F. Cor.
242.
(c) F. Cor. 431.
S. P. C. 133.

SECT. 6. SIXTHLY, If (d) the gaoler so closely pursue the prisoner who flies from him, that he re take him without losing sight of him, the law looks on the prisoner so far in his power all the time as not to adjudge such a flight to amount at all to an escape: But if the gaoler once lose sight of the prisoner, and afterwards re-take him, he seems in strictness to be guilty of an escape; and *a fortiori* therefore, (e) if he kill him in the pursuit, he is in like manner guilty, though he never lost sight of him, and could not otherwise take him, not only because the king loses the benefit he might have had from the attainder of the prisoner by the forfeiture of his goods, &c. but also because the publick justice is not so well satisfied by the killing him in such an extrajudicial manner.

(d) F. Co.
236. 400.
S. P. C. 33.
1. Hale 602.
B. Escape 14.
32. 49. 52.
10. H. 7. 25,
26.
6. H. 7. 11, 12.
(e) F. Cor.
328. 246.
S. P. C. 33.
See b. 1. c. 28.
sect. 11, 12.

SECT. 7. SEVENTHLY, While the privileges of sanctuaries were allowed, if a sheriff conducting a prisoner to gaol had brought him in the way through the limits of such a franchise, and the prisoner had claimed the privilege of it, and by that means got free, it seems (f) that the sheriff was guilty of an escape, for that it was his fault, by bringing his prisoner that way to gaol, to give him an opportunity of claiming the franchise.

(f) B. Escape
38. 50.
2. H. 4. 15.
F. Cor. 222.
316.
but 27. Aff. 54.
24. seem con-

and B. Escape

Sect.

SECT. 8. EIGHTHLY, Also while the law allowed those who had the benefit of the clergy to free themselves from prison in certain cases, by making their purgation before the ordinary, it was an escape (a) in the ordinary, to suffer such persons to deliver themselves by it, in such cases in which they ought not to have been admitted to it.

(a) F. Cor.
16.

27. H. 6. 7.

S. P. C. 33.

Vide 23. H. 8. 11.

(b) B. Escape

10. 32. 52.

6. H. 7. 11.

12.

10. H. 7. 25.

26.

29. Affize 34.

SECT. 9. NINTHLY, If (b) a prisoner be rescued by enemies, the gaoler is not guilty of an escape, as he would have been, by the better opinion, if he had been rescued by subjects, because there is a legal remedy against them.

1. Hale 596. B. Escape 26. seems contrary.

AS TO THE SECOND POINT, *viz.* Where such escape is to be esteemed voluntary, and where negligent.

(c) See C.
Car. 492.

S. P. C. 32.

It is an escape to discharge a night-walker from the watch-house, although no positive charge is made.

2. Burr. 867.

(d) Sum. 113.

Supra, sect. 5.

1. Hale 596,

597.

SECT. 10. There (c) can be no doubt, but that where-ever an officer, who hath the custody of a prisoner, charged with, and guilty of, a capital offence, doth knowingly give him his liberty with an intent to save him either from his trial or execution, he is guilty of a voluntary escape, and thereby involved in the guilt of the same crime of which the prisoner was guilty, and stood charged with. And it seems to be the opinion of *Sir Matthew Hale*, (d) that in some cases an officer may be adjudged guilty of such escape, who hath not such intent, but only means to give his prisoner that liberty which by the law he hath no colour of right to give him; as where a gaoler bails a prisoner who is not bailable. But it seems agreed, that a person who hath power to bail, is guilty only of a negligent escape, by bailing one who is not bailable: neither can I meet with any authority in other books, to support the above-mentioned opinion, that the bailing of one who is not bailable, by one who hath no power to bail, must necessarily be esteemed a voluntary escape; but the contrary opinion seems more agreeable to the purview of 5. Edw. 3. c. 8. set forth more at large in the subsequent part of this chapter. Also there are some cases wherein an officer seems to have been found (e) to have knowingly given his prisoner more liberty than he ought to have had, as to go out of the prison on promise of returning, or to go among his friends, to find some who would warrant goods to be his own, which he is suspected to have stolen, and yet seems to have been only adjudged guilty of a negligent escape. But it must be confessed, that in these cases the prisoner was only accused of larceny; and it doth not appear, whether he were bailable or not; and

(e) F. Cor.

242. 316. 431.

S. P. C. 33.

generally

generally the old cases concerning this subject are so very briefly reported, that it is very difficult to make an exact state of the matter from them : However thus much seems clear, that if in the cases above-mentioned the officer were only guilty of a negligent escape, in suffering the prisoner to go out of the limits of the prison without any security for his return, he could not have been guilty in a higher degree, if he had taken bail for his return : From which it seems reasonable to infer, that it cannot be in all cases a general rule, that an officer is guilty of a voluntary escape by bailing his prisoner whom he hath no power to bail ; but that the judgment to be made of all offences of this kind, must depend on the circumstances of the case, as the heinousness of his crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, the motives on which he acted, &c.

1. Hale 597.

SECT. 11. Neither is it a certain rule, that an officer, who unlawfully, knowingly, and willingly suffers a capital offender to escape, is in all cases to be adjudged guilty of a voluntary escape ; for where an ordinary suffered a clerk attainted, being committed to his custody, to free himself from imprisonment, by making his purgation, he might be truly said to have suffered such prisoner to escape unlawfully, knowingly, and willingly ; and yet it seems, (a) that he was guilty only of a negligent escape, for that he did not save the prisoner from execution, which was excused by the privilege of the clergy, but only from the imprisonment.

(a) F. Cor.

16. 370.

F. Escape 1.

S. P. C. 34.

141.

15. H. 7. 9. 1. Hale 593.

As to THE THIRD POINT, viz. In what cases a prisoner may be re-taken after an escape.

SECT. 12. It seems to be clearly agreed, by all the books, (b) that an officer making a fresh pursuit after a prisoner, who hath escaped through his negligence, may re-take him at any time after, whether he find him in the same, or in a different (c) county. And it is said generally in some books, (d) that an officer who hath negligently suffered a prisoner to escape, may re-take him wherever he finds him, without mentioning any fresh pursuit ; and indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. But where a gaoler

(b) F. Tref.

94.

F. Escape 2.

F. Corone.

236.

B. Escape 49.

32. 52.

1. Hale 602.

13. Ed. 4. 9.

2. Ed. 4. 6.

(c) 33. H. 6.

52. 53.

3. Co. 44. 52.

B. Escape 4. Fresh Suit 3. 5. Con. Keilw. 3. (d) F. Cor. 236. 400. 313. 335. S. P. C. 117. B. Execution 58. 151. 27. H. 8. 1. 13. H. 7. 1. F. N. B. 130.

hath

(a) 2. Jones
21, 22. 45.
3. Coke 52.
C. Jac. 659.
Qu. r.
Danv. Abr.
633. 535.
(b) S. P. C. 33.
(c) 13. E. 4. 9.
F. Escape 2.
B. Escape 35.
1. Hale 602.
Summary 114.

hath voluntarily suffered a prisoner to escape, it is said by some, (a) that he can no more justify the re-taking him, than if he had never had him in custody before, because by his own free consent he hath admitted, that he hath nothing to do with him. And it seems to be holden by *Sir William Staunford*, (b) that after a gaoler hath been fined for suffering a prisoner negligently to escape, he cannot afterwards retake him; but the book (c) on which alone he seems to ground his opinion, doth not fully come up to it; for the purport of it seems to be no more than this, that a gaoler's re-taking of a prisoner, after he hath been fined for an escape, shall be to no purpose, for that it is contrary to the record, by which it appears that the prisoner hath been at large; by which it seems only to be intended, that a gaoler, who hath been fined for an escape, shall not avoid the judgment of his fine by re-taking the prisoner: But I do not see how it can be collected from hence, that he cannot justify the re-taking him.

As to THE FOURTH POINT, viz. How far an escape is excused by re-taking the prisoner, or by killing him, if he cannot be re-taken.

S. P. C. 33.
Summary 114.
seems contrary.

See the books
cited sect. 6.
1. R. Abr. 808.
2. Danv. Abr.
633.
3. Danv. Abr.
119.
Vide 8. W. 3.
c. 27.

SECT. 13. Perhaps it is the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power that the keeper loses sight of him, the keeper is finable, at the discretion of the court, notwithstanding he re-took him immediately after; for it seems agreed, that this is to be adjudged a negligent escape, which implies an offence, and consequently that it must be punishable. It is true indeed, that in an action against a gaoler for suffering one arrested in a civil action to escape, it is a good excuse for the gaoler, that before the action brought he re-took the prisoner upon fresh suit, which is well maintained by shewing that he pursued him immediately after notice of the escape, though it were some hours after it, and re-took him; but it does not from hence follow, that the like excuse will serve for the negligent escape of a criminal, because this is an offence against the publick, but the other is only a private damage to the party. Neither will it be the like hardship to the officer to be exposed to such punishment as the Court in discretion shall think fit to impose upon him for the negligent escape of a criminal, as it would be to be liable to an action of escape, for suffering a person in his custody, in a civil action, to escape; for that in the former case the Court would moderate his fine according to the circumstances of the whole matter, and would certainly mitigate, if not wholly excuse it, if he should appear to have taken all reasonable care. But, in the other case, if he should be
liable

liable to an action, his judgment would not lie in the discretion of the court, but he would be bound to pay the whole debt for which the party was in his custody, if the escape should be adjudged against him. However it is certain, that it will be no advantage to a gaoler to re-take his prisoner, after he has been fined for the escape, as hath been shewn in the precedent section. Also it is clear, that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly re-take him; but must, in such case, be content to submit to such fine as his negligence shall appear to deserve.

Vide sup.
sect. 6.

AS TO THE FIFTH POINT, *viz.* In what manner the officer suffering an escape is to be indicted.

Sect. 14. It seems clear, that every indictment for an escape, whether negligent or voluntary, must expressly shew, that the party was actually (a) in the defendant's custody for a crime, action, or commitment for it; and that (b) it is not sufficient to say, that he was in the defendant's custody, and charged with such a crime; for that a person in custody may be so charged, and yet not be in custody by reason of such charge. And it seems also, that every such indictment must expressly shew that the prisoner went at large, which is most properly (c) expressed by the word *exiit ad largum*. Also it seems necessary to shew the time when the offence was committed for which the party was in custody, not only (d) that it may appear that it was prior to the escape, but also (e) that it was subsequent to the last general pardon. Also it seems clear, that every indictment for a voluntary escape, must alledge that the defendant *felonice et voluntarie* A. B. *ad largum ire permisit*; and must (f) also shew the species of the crime for which the party was imprisoned; for it is not sufficient to say, in general, that he was in custody for felony, &c. for that no one can be punished in this degree, but as involved in the guilt of the crime for which the party was in his custody; and therefore the particular crime must be set forth, that it may appear, that the principal is attainted for the very same crime, if it were felony. or that it was in truth committed, if high treason. But it seems questionable, (g) whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape, for that it is not material in this case, whether the person who escaped were guilty or not.

(a) 27. Affize 9.
1. Hale 599.
B. Escape 22.
F. Affize 247.
(b) Salkeld
272.
5. Modern
414. 415.
Holt 283.
Roll. Ab.
806.
C. J. 538.
Salkeld 272.
(c) B. Escape
52.
10. H. 7. 26.
(d) Con.
2. Leach. 166.
B. Escape 17.
C. H. 752.
(e) Het. 13.
(f) C. Eliz. 52.
Het. 73.
S. P. 95.
Summary 110,
111. 309.
S. Ed. 4. 3.
(g) See Keilw.
192. 194.

S. P. C. 34, 35. As to THE SIXTH POINT, viz. In what manner an escape
 V. Corone 466. is to be tried and adjudged.

Sec. 15. It is to be observed, that where persons being present in a court of record, are committed to prison by such court, the keeper of the gaol is bound to have them always ready, whenever the court shall demand them of him, and if he shall fail to produce them at such demand, the court will adjudge him guilty of an escape, without any farther inquiry, unless he have some reasonable matter to alledge in his excuse; as that the prison was set on fire, or broken open by enemies, &c. for he shall be concluded,

(a) 11 H. 6. 49. (a) by the record of the commitment, to deny that the
 12. H. 6. 2, 3. prisoners were in his custody. And some (b) have holden,
 S. P. C. 35. that if a gaoler say nothing in excuse of such an escape,
 (b) S. P. C. 34. it shall be adjudged voluntary; but I cannot find any resolution
 39. H. 6. 33, 34. to this purpose; and where it stands indifferent, whether
 1. Hale 599. an escape be negligent or voluntary, it seems difficult to
 603. maintain that it ought to be adjudged a crime of so high a nature, without a previous trial.

Sec. 16. As to other prisoners who are not so committed, but are in the custody of a gaoler, sheriff, constable, or other person, by any other means whatsoever, it seems agreed,
 (c) S. P. C. 35. (c) that the person who has them in custody is in no case punishable for their escape, except in some special cases, until it be presented.

For the better understanding whereof I shall endeavour to shew,

1. Before whom such presentments are to be made;
2. In what cases they are traversable.

As to the first particular, viz. Before whom such presentments are to be made.

Sec. 17. It is enacted by the *statute of Westminster* 1. c. 3. "That nothing be demanded nor taken, nor levied by the sheriff, nor by any other, for the escape of a thief, or felon, until it be judged for an escape by the justices in eyre; and that he who does otherwise, shall restore to him or them that have paid it, as much as that he or they have taken or received, and as much also unto the king."

(d) 27. Affize *Sec. 18.* It hath been adjudged, (d) that this statute
 9. restrains not the court of king's bench from receiving such
 21. Affize 12. presentments, for that its jurisdiction includes in it that
 S. P. C. 35. of justices of eyre, and this court is itself the highest court
 2. Infl. 166. of eyre.
 1. Hale 600.

Sec.

Señ. 19. It is farther enacted, by 31. Edw. 3. c. 14.
 " That the escape of thieves and felons, and the chattels
 " of felons, and of fugitives, and also escapes of clerks
 " convict, out of their ordinary's prison, from thenceforth
 " to be judged before any of the king's justices, shall be
 " levied from time to time, as they shall fail, as well of
 " the time past as time to come." By which it seems
 to be implied, that other justices, as well as those in
 eyre, may take cognizance of escapes; and it is certain,
 that justices of gaol-delivery may punish justices of peace
 for a negligent escape, in admitting persons to bail who
 are not bailable. Ante sect. 12.
15.
S. P. C. 35.

Señ. 20. And it is farther enacted by 1. Rich. 3. c. 3.
 " That justices of peace shall have authority to inquire in
 " their sessions, of all manner of escapes of every person ar-
 " rested and imprisoned for felony."

As to the second particular, *viz.* In what cases such pre-
 sentments are traversable.

Señ. 21. It is laid down as a rule, by Sir William
Staundford, that wherever an escape is finable, the present-
 ment of it is traversable; but that where the offence is
 amerciable only, there the presentment is of itself conclu-
 sive; such amercements being reckoned among those *minima*
de quibus non curat lex; and this distinction seems to be
 well warranted by the old (*a*) books; and in what cases
 escapes are finable, and where amerciable only, shall be
 considered in the following part of this chapter, section 31.
 33. 35. S. P. C. 35.
(a) 21. Aff. 12.
27. Aff. 9. 27.
F. Co. 291. 328.
345, 346. 352.
1. Hale 603.
2. Hale 154.

As to THE SEVENTH POINT, *viz.* In what manner a
 voluntary escape is to be punished.

Señ. 22. It seems to be generally (*b*) agreed, that such
 escape amounts to the same kind of crime, and is punishable
 in the same degree, as the offence of which the party was
 guilty, and for which he was in custody, whether it be trea-
 son, felony, or trespass, and whether the person escaping
 were actually committed to some gaol, or under an arrest
 only and not committed; and whether he were attainted,
 or only accused (*c*) of such crime, and neither indicted nor
 appealed. And it is said to be no excuse of such escape, that
 the prisoner had been acquitted on an indictment of death,
 and only committed till the year and day be passed, to give
 the widow or heir of the deceased an opportunity of bring-
 ing their appeal. (b) S. P. C.
32. 1.
Summary 113.
1. Hale 234.
390. 391. 593.
B. Cor. 112.
27. Affize 62.
11. H. 4. 12.
(c) Sum. 114.
115.
Dyer 99.
F. Escape 3.
27. Affize 62.

Sec. 23. Also such an escape, suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be (a) punishable in the same manner as if he were never so rightfully intitled to such custody, for that he crime is in both cases of the very same ill consequence to the publick, and there seems to be no reason that a wrongful officer should have greater favour than a rightful officer, and that for no other reason but because he is a wrongful officer.

(a) B. Escape 18. 23.
2. Roll. 146.
F. Aff. 252.
39. H. 6. 3. 354.
Quære 27.
A. 17. 17.
1. Hale 594.
Summary 114.

Sec. 24. Also if the warrant of commitment do plainly and expressly charge the party with treason or felony, but in some other respect be not strictly formal, yet it seems that it may (b) be probably argued, that the gaoler suffering an escape, is as much punishable as if the warrant were perfectly right, for it would be highly inconvenient to suffer gaolers to take advantage of a slip of this kind in commitments, which being generally made by persons of no great knowledge in the law, cannot be expected to be always agreeable to its forms; and therefore if they be good in substance, the publick good seems to require, that the gaoler be as much bound to observe them, as if they were never so exactly made.

✓
(c) Summary 114. 219.
S. c. 16. sect. 19.
11. H. 4. 12.
1. Hale 591.

Sec. 25. But it seems to be agreed, that no escape can amount to a capital offence, unless the cause for which the party was committed. (c) were actually such at the time of the escape; and therefore, if a gaoler suffer one to escape who is committed for having given a dangerous wound to another, who afterwards dies of such wound, yet he is not guilty of felony, for that the offence of the prisoner was but a trespass at the time of the escape; and though by a fiction of law it be afterwards, for some purposes, esteemed a felony from the time of the giving of the wound, yet since it is, in truth, no felony till the death of the party, it shall be afterwards construed such in respect of those only who were privy to the giving of the wound

1. Hale 237.
237. 591. 598.
Summary 110.
215. 216.
2. Hale 2. 4.
F. Cor. 158.
Quære 27.
Aff. 62. Con.
Crom. 58.
(d) Summary 116.
F. Cor. 158.
See c. 18.
sect. 21. Summary 110. seems con.

Sec. 26. Also it seems clear, that he who suffers another to escape who was in his custody for felony, cannot be arraigned for such escape as for felony, until the principal be attainted: for that he who suffers such escape is, by the better opinion, not punishable in this degree, but as an accessory to the felony; and it is a rule, that no accessory ought to be tried till the principal be attainted, as shall be more fully shewn hereafter. Yet it seems certain, (d) that one accused of such an escape may be indicted and tried for a misprision, before the attainder of the principal offender, for that whe-

ther such offender were guilty or innocent, it was a high contempt to suffer him to escape. And if the commitment were for high treason, and the person committed actually guilty of it, it seems that the escape is immediately punishable as high treason also, whether the party escaping be ever convicted of such crime or not; for that there are no accessories in high treason, but all who are guilty of assisting the party guilty of such crime, in such a manner as would make them accessories to a felony, are accounted principals in the treason, as shall be more fully shewn in the chapter concerning Principal and Accessary. Summary 116.

Sec. 27. Also it seems to be clear, that no one is punishable in this degree for a voluntary escape, but the person only who is actually guilty of it; and therefore, that the principal gaoler is only liable for a voluntary escape suffered by his deputy, for that no one shall suffer capitalty for the crime of another. Salkeld 272.
Summary 113.
1. Hale 597,
598.

AS TO THE EIGHTH POINT, *viz.* In what manner a negligent escape is to be punished; I shall endeavour to shew,

1. How such escape is punishable by the common law;
2. How by statute.

As to the first particular, *viz.* In what manner a negligent escape shall be punished by the common law. Summary 114.
2. Roll. 146.
R. Escape, 18.

Sec. 28. I shall take it for granted at this day, that whoever *de facto* occupies the office of gaoler is liable to answer for such an escape, and that it is no way material whether his title to the office be legal or not. 23.
Que. 27. Aff. 27.
Vide sup. sect. 23.

Sec. 29. Also I take it to be the better opinion, that (a) a sheriff is as much liable to answer for an escape suffered by his bailiff, as if he had actually suffered it himself, and that (b) the court may charge either the sheriff or bailiff for such an escape; and if a deputy-gaoler be not sufficient to answer a negligent escape, his principal must answer for him: but if the gaoler who suffers an escape, have an estate (c) for life, or years in the office, I do not find it agreed how far he in reversion is liable to be punished. (a) F. Cor. 337.
(b) Salkeld 272.
Summary 113.
1. Hale 597-604.
2. Levinz 71.
(c) 39. H. 6. 33, 34.
2. R. Abr. 155.

2. Levinz 81. 3. Levinz 288.

Sec. 30. It seems the better opinion, that one negligent escape will not amount to a forfeiture of a gaoler's office, as

(a) B. For. of one voluntary (a) one will; yet if a gaoler suffer many
 Offices, 27. negligent escapes, it is said, that he puts it in the power of
 2. R. A. 155. the court to oust him of his office by its discretion.

Señ. 31. It seems to be certain, that wherever a person is found guilty upon an indictment, or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the king, which seems most properly to be called a FINE. But this does not clearly appear from the old books; for in some (b) 8. H. 5. 2. (b) of them it seems to be taken as a fine, in others (c) as an amercement, and in others it is spoken of generally, as an imposition of a certain sum, and without any (d) mention either of fine or amercement. But where the books speak of the punishment of a vill or hundred, for (c) F. Cor. suffering a felon to escape without being arrested, they seem always to take it as an amercement, and not as a (d) 25. Ed. 3. fine: And where a sheriff, having returned a *cepi corpus* into the king's bench, on a *cepius* against a man on an indictment of felony, does not bring him in at the day, it seems (e) that he is, by the course of the said court, to be amerced, not fined.
 39. 22. Affize 9.
 S. P. C. 65. Summary 113.
 F. Cor. 196.
 291. 370. Graunt 39. Escape 4. See the Books supra c. 12. *señ. 2.* (e) F. Escape 7.
 40. Affize, 42.

Señ. 32. It hath been holden, (f) that a negligent escape may be pardoned by the king before it happens, but (f) 3. H. 7. 15. that a voluntary one cannot be so pardoned; but this shall F. Graunt 37. be more fully considered in the chapter concerning Pardon.

(g) S. P. C. 35. *Señ. 33.* And it seems, (g) that by the common law, the penalty for suffering the negligent escape of a person attainted, was of course a hundred pounds, and for suffering such escape of a person indicted and not attainted, was five pounds (h); but if the person escaping were neither attainted nor indicted, it seems, that it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper; and (i) if the party had twice escaped, it seems, that the penalties above-mentioned were of course to be doubled; yet it seems, that the forfeiture was to be no greater for suffering (k) a prisoner committed on two several accusations to escape, than if he had been committed but on one.
 1. Hale 604.
 F. Cor. 370.
 (b) S. P. C. 35.
 Summary 113.
 27. Affize 9.
 40. Affize 42.
 25. Ed. 3. 39.
 F. Cor. 454.
 (i) S. P. C. 33.
 F. Cor. 422.
 (k) F. Cor. 196.
 26. Affize 51.

As to the second particular, *viz.* In what manner offences of this kind are punishable by statute.

Señ. 34. It is recited by 5. Edw. 3. c. 8. "That persons indicted of felonies in times past, had removed the in-
 On a conviction for letting a prisoner escape, when the defendant is brought before the court for judgment, the prosecutor may produce and read affidavits, made even by a witness on the trial, in aggravation of the damages, which the defendant, in mitigation, may answer and contradict. Rex v. Sharpnells, Easter, 26. Geo. 3.

dictments

dictments before the king, and there yielded themselves, and by the marshals of the king's bench had been incontinently let to bail, and after had done many evil deeds, &c." and thereupon it is enacted, " that such inditees and appellees shall be safely and surely kept in prison, as belongeth to them, according to the charge which the said marshals shall have of the justices; and if any marshal shall do otherwise, at the complaint of every man that will complain, the justices shall do him right during the Terms; and in the end of the Terms, upon their rising, the said marshals shall choose before the said justices, before they depart their places, in what town they will keep such prisoners at their peril: And in the same town they shall allow to them houses to keep such prisoners at their own costs and charges; and there they shall keep them in prison, and shall not suffer them to go wandering abroad, neither by bail nor without bail. And if any such prisoner be found wandering out of prison by bail or without bail, and that be found at the king's suit, or at the suit of the party, the marshals which shall be found thereof guilty shall have half a year's imprisonment, and be ransomed at the king's will; and the justices shall thereof make inquiry when they see time; and as to the marshals, it shall be done within the verge that which reason will. And in case that the marshals suffer by their assent such prisoners to escape, they shall be at the law, as before the time of the statute they had been. And the king intendeth not by this statute to lose the escape, where he ought to have the same."

Stat. 35. Also it is enacted by 19. Hen. 7. c. 10. " That every sheriff have the custody of the king's common gaols, during the time of his office, except all gaols whereof any person or persons have the keeping of estate of inheritance: And that all letters patents made for term of life, or years, of the keeping of the said gaols, &c. shall be annulled and void."

Vide 5. Anne c. 9.—The penalties for escapes inflicted by the subsequent part of this statute, which were recited

in the former edition of this work, have been expired above 200 years. *Vide Ruffhead's Statutes, and 1. Burn's Justice 503.*

CHAPTER THE TWENTIETH.

OF ESCAPES

SUFFERED

BY PRIVATE PERSONS.

Summary 112. **H**AVING in the precedent chapter endeavoured to shew the nature of ESCAPES *suffered by officers*, I am now in the second place to consider the nature of such ESCAPES *suffered by private persons*.

But the law being generally the same in relation to such escapes, as in relation to those suffered by officers, I shall refer the Reader, for the general learning of this kind, to what is said in the former chapter, concerning Escapes suffered by Officers.

I shall content myself in this place with considering the two following particulars :

1. Where a private person is to be adjudged guilty of such an escape ;

2. In what manner he is to be punished.

As to THE FIRST POINT, *viz.* When a private person is to be *adjudged guilty* of an escape.

Sett. 1. It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty (a) of an escape, if he suffer him to go at large, before he hath discharged himself of him by delivering him over to some other who by law ought to have the custody of him.

(a) See c. 12.
Summary 112.
1. Hale 595.

Sett. 2. And therefore, if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person, who receives him, and suffers him to go at large, it is said, (b) that both of them are guilty of an escape ; the first, because he should not have parted with him till he had delivered him into the hands of a publick officer ; the latter, because, having charged himself with the custody of a prisoner, he ought, at his peril, to have taken care of him.

(b) Sum. 112.
44. Ailze 12.
B. Escape 31.
43. Ed. 3. 36.
F. Cor. 454.
J. Escape 3.

Sett.

Sec. 3. But if a private person having made such an arrest, have delivered over his prisoner to the proper officer, as the sheriff, (a) or his bailiff, (b) or a constable (c), from (a) F. Cor. whose custody the prisoner escapes, the party who made the arrest is not chargeable with it. (b) F. Cor. 345. 328 337.

S. P. C. 34. (c) Sum. 112. 1. Hale 594, 595.

Sec. 4. But if no officer will receive such prisoner into his custody, it seems (d) to be the safest way to deliver him (d) 10. H. 7. into the custody of the township where the person who arrested him lives, or perhaps of that where the arrest was made, which shall be bound to keep him till the next gaol-delivery; but if such township refuse also to receive him, I do not see how the person who made that arrest can discharge himself of him before the next gaol-delivery, unless he can in the mean time procure him to be bailed. F. Escape 8.

Sec. 5. Neither can such private person excuse himself of the escape of such a prisoner, by alledging that he delivered him over to a sheriff or other officer, without shewing to whom, in particular, by name, he so delivered him, that the court may certainly know who is answerable for him. Summary 114. F. Cor. 345.

As to THE SECOND POINT, viz. In what manner a private person is *punishable* for such an escape.

Sec. 6. I shall take it for granted that if it were voluntary, he is punishable in the same manner as an officer, for which I shall refer the Reader to the former chapter; and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the court. Summary 112. B. Cor. 112. 27. A. T. 62. Vide De Testifier's Case, Black. 268.

who was fined 50l. for effecting the escape of French prisoners.

CHAPTER THE TWENTY-FIRST.

OF

R E S C O U S.

1. Hale 606.

THE offence of a stranger in forcibly freeing another from an arrest, comes under the notion of **RESCOUS**, which in most instances is of the same nature with the offence of *breaking prison*, which hath been already considered in the eighteenth chapter.

It seems, therefore, sufficient for the declaration of the nature of this crime, to shew,

1. In what cases the offence of **RESCOUS** agrees with the offence of *breaking prison*;

2. In what it differs;

3. What provisions the Legislature has made upon this subject.

I. This offence agrees with that of *breaking prison* in the following particulars.

1. Inst. 589.
S. P. C. 30, 31.
and the cases
cited c. 18. f.
1. & 4.

SECT. 1. FIRST, Whatever is such a prison that the party himself was, by the common law, guilty of felony by breaking from it, in every such case a stranger was guilty of as high a crime at least, in rescuing him from it.

(a) See c. 18.
S. P. C. 30, 31.
Sum. 116.

SECT. 2. SECONDLY, Wherever (a) the imprisonment is so far groundless, or irregular, or for such a cause, or the breaking of it is occasioned by such a necessity, &c. that the party himself breaking the prison is, either by the common law, or by the statute *de frangentibus prisonam*, saved from the penalty of a capital offender, a stranger who rescues him from such an imprisonment, is in like manner also excused; *et sic à converſo*.

Keilwood 78.
B. Escape, 52.

SECT. 3. THIRDLY, As the party himself seems not to be guilty of felony by breaking the prison unless he go out of it, so neither is a stranger unless the prisoner actually go out of the prison.

SECT.

Sett. 4. FOURTHLY, As the sheriff's return, that a prisoner hath broken the prison, is not a sufficient ground to arraign him for such offence, unless he be indicted also for it; so neither is his return of a rescous a good ground for the arraignment of the rescuer, unless he be indicted.

F. Eudit. 30.
1. H. 7. 6.
4. Burr. 2129.

Sett. 5. FIFTHLY, As an indictment of breaking prison, and also an indictment of escape, must specially set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question, so also must an indictment of rescous.

Vide sup. c. 18.
f. 20. & c. 19.
f. 14.
Dyer 164.

Sett. 6. SIXTHLY, As those who break prison are still punishable, as for a high misprision, by fine and imprisonment, in those cases wherein they are saved from judgment of death, by the statute *de frangentibus prisonam*, so also are those who rescue such prisoners in the like cases in the same manner punishable.

Vide sup. c.
18. f. 21.

II. The offence of RESCOUS differs from that of *breaking prison* in the following particulars.

Sett. 7. FIRST, Whereas a person committed for high treason, who breaks the prison and escapes, is guilty of felony only, unless he lets others also escape whom he knows to be committed for high treason, in which case he is guilty of high treason, not in respect of his own breaking of the prison, but of the rescous of the others; a stranger (a) who rescues a person committed for and guilty of high treason, knowing him to be so committed, is in all cases guilty of high treason; and by some (b) he is in like manner guilty whether he knew that the prisoners were committed for high treason or not. But this opinion is not proved by the authority of the case (c) on which it seems to be grounded.

Vide sup. c.
18. f. 17.
1. Hale 237.

(a) S. P. C.
11. 32.
Summary 109.
Dalton f. 228.
1. Jones 455.
1. H. 6. 5.
F. Cor. 2.
B. Treas. 11.
(b) C. Car.
583.
(c) 1. H. 6. 5.

Sett. 8. SECONDLY, Whereas a prisoner who breaks the prison may be arraigned (d) for such offence before he is arraigned of the crime for which he was imprisoned, he who rescues one imprisoned for felony cannot, according to the better (e) opinion, be arraigned for such offence as for a felony, until the principal offender be first attainted; but if the person rescued were imprisoned for high treason, the rescuer may immediately be arraigned, for that in high treason all are principals: also it seems, that he may be immediately proceeded against for a misprision only, if the king please.

(d) Sup. c. 13.
f. 17.

(e) Vide sup.
c. 19.
Summary 116.
S. P. C. 43.
seems contrary.

III. The

† III. The Legislature hath made provisions upon this subject in the following instances.

1. In assisting the rescue of a prisoner convicted of treason or felony.
2. In assisting the rescue of a prisoner committed for petty larceny.
3. In conveying instruments into any prison to facilitate escapes of prisoners committed for treason or felony.
4. In delivering instruments of escape to persons committed for petty larceny.
5. To aid and assist in rescuing a felon or traitor from the custody of a constable.
6. In rescuing a person ordered for transportation.
7. In rescuing a person convicted of murder.
8. In rescuing the dead body of a malefactor.
9. In rescuing smugglers.
10. In rescuing offenders against the Black Act.
11. In rescuing goods distrained for rent.

Vide 1. Ann.

ft. 2. c. 6. and

5. Ann. c. 9.

respecting re-

scues upon ci-

vil process,

and 8. & 9.

Will. 3. c. 27.

by which it is

made felony,

without bene-

fit of clergy,

to oppose the

execution of process,

or to rescue prisoners in any of the pretended privileged places therein mentioned.

† *Seff.* 9. FIRST, It is enacted by 16. Geo. 2. c. 31.

“ That if any person shall by any means whatsoever be

“ aiding or assisting to any prisoner to attempt to make his

“ or her escape from any gaol, though no escape be actually

“ made, in case such prisoner was then attainted or convicted

“ of treason, or any felony except petty larceny, or lawfully

“ committed to or detained in any gaol, for treason or any

“ felony except petty larceny, expressed in the warrant of

“ commitment or detainer, every person so offending shall,

“ on conviction, be transported for seven years.”

“ to oppose the execution of process, or to rescue prisoners in any of the pretended privileged places therein mentioned.

Assisting the

escape of a pri-

soner for petit

larceny, &c.

† *Seff.* 10. SECONDLY, It is also enacted, “ That in

“ case such prisoner then was convicted of, committed to, or

“ detained in any gaol for petty larceny, or any other crime,

“ not being treason or felony expressed in the warrant of

“ his or her commitment or detainer as aforesaid, or then

“ was in gaol upon any process whatsoever, for any debt,

“ damages,

“ damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every person so offending as aforesaid, shall, on conviction, be deemed guilty of a misdemeanor liable to fine and imprisonment.”

† *Sec. 11.* THIRDLY, It is also further enacted by par. 2. “ That if any person shall convey or cause to be conveyed into any gaol or prison any visor or other disguise, or any instrument or arms proper to facilitate the escape of prisoners; and the same shall deliver or cause to be delivered to any prisoner in any such gaol, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper or under-keeper of any such gaol or prison; every such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such visor or other disguise, instrument or arms, with an intent to aid and assist such prisoner to escape or attempt to escape; and in case such prisoner then was attainted or convicted of treason or any felony except petty larceny, or lawfully committed to, or detained in any such gaol for treason or any felony except petty larceny expressed in the warrant of commitment or detainer, every person so offending shall, on conviction, be deemed guilty of felony, and transported for seven years.”

Conveying instruments to facilitate escape is transportation.

The indictment must state that the instruments were conveyed with a *design* to effectuate the escape. O. B. But no indictment can be maintained upon this act of parliament for contributing to the escape of a prisoner committed on suspicion only. Walker's Case, 1774, Cases Crown Law 92. and the King v. Greeniff, at Maidstone, Lent Assizes 1785. Cases Crown Law, 292. Vide also the case of William Gibbens, Cases Crown Law, 293. *notes.*

† *Sec. 12.* FOURTHLY, And it is further enacted, “ That in case the prisoner to whom, and for whose use such visor or disguise, instrument or arms shall be so delivered, then was convicted, committed or detained for petty larceny, or any other crime not being treason or felony expressed in the warrant of commitment or detainer, or upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every such person so offending shall, on conviction, be deemed guilty of a misdemeanor, and liable to fine and imprisonment.”

But if detained for petty larceny, a misdemeanor.

† *Sec. 13.* FIFTHLY, And it is also enacted by par. 3. Vide 6. Geo. 1. c. 23. s. 5. and 24. Geo. 3. c. 56. “ That if any person shall aid or assist any prisoner to attempt to make his or her escape from the custody of any where to assist felons convict to make their escape from the persons to whom they are delivered to be transported, is felony without clergy. And vide 3. Peere Will. 439. “ constable,

“ comitable, headborough, tythingman, or other officer or
 “ person who shall then have the lawful charge of such
 “ prisoner in order to carry him or her to gaol, by virtue
 “ of a warrant of commitment for treason or any felony
 “ (except petty larceny) expressed in such warrant, or if
 “ any person shall be aiding or assisting to any felon to
 “ attempt to make his escape from on board any boat, ship,
 “ or vessel, carrying felons for transportation, or from the
 “ contractor for the transportation of such felons, his assigns
 “ or agents, or any other person to whom such felon shall
 “ have been lawfully delivered in order for transportation,
 “ then every person so offending, on conviction, shall be
 “ guilty of felony, and transported for seven years.”

Returning
 from trans-
 portation,
 felony.

+ *Sec. 14.* SIXTHLY, And it is further enacted, “ That
 “ if any person who shall be ordered for transportation in
 “ pursuance of this act, shall return or be found at large,
 “ without some lawful cause, before the expiration of the
 “ term, he shall be liable to the same punishment, prosecu-
 “ tion, trial, and conviction, as other felons returning, &c.
 “ from transportation, &c. are liable to.”

Limitation.

+ *Sec. 15.* Provided always, “ That there shall be no
 “ prosecution for any of the said offences, unless such pro-
 “ secution be commenced within one year after such offence
 “ committed.”

Rescuing a
 convict for
 murder, &c.

+ *Sec. 16.* SEVENTHLY, By 25. Geo. 2. c. 37. s. 9. it is
 enacted, “ That if any person or persons whatsoever shall
 “ by force set at liberty or rescue or attempt to rescue, or
 “ set at liberty, any person out of prison who shall be com-
 “ mitted for, or found guilty of murder, or rescue, or at-
 “ tempt to rescue any person convicted of murder going to
 “ execution, or during execution, every person so offending
 “ shall be deemed guilty of felony, and suffer death without
 “ benefit of clergy.”

Rescuing the
 dead body of a
 malefactor,
 &c.

+ *Sec. 17.* EIGHTHLY, By 25. Geo. 2. c. 39. it is enacted,
 “ That if any person or persons whatsoever shall, after such
 “ execution had, by force rescue, or attempt to rescue the
 “ body of such offender out of the custody of the sheriff
 “ or his officers, during the conveyance of such body to
 “ any of the places directed by the act; or shall by force
 “ rescue, or attempt to rescue such body from the company
 “ of surgeons, or their officers or servants, or from the
 “ house of any surgeon where the same shall have been de-
 “ posited in pursuance of this act; every person so offending
 “ shall be transported for seven years, and shall be subject
 “ to the like punishment, &c. in case of returning, as by
 “ law

“ law other felons returning from transportation are subject to.”

† *Sect.* 18. NINTHLY, By 11. Geo. 2. c. 26. “ If any persons, to the number of five or more, shall in a tumultuous and riotous manner assemble themselves to rescue any offender against 9. Geo. 2. c. 23. or to assault, beat, or wound any person or persons who shall have given, or be about to give, any information or evidence against, or shall have discovered or given evidence against, or be about to discover or give evidence against, seize or bring to justice any person or persons offending against the said act, they, their aiders and abettors, shall be guilty of felony, and the court on conviction shall have power to transport them for seven years.”

By 2. Will. & M. sess. 1. c. 5. §. 4. persons guilty of any pound breach, or the rescous of any goods or chattels distrained for rent, or of the owner of any goods so distrained, shall pay treble damages, 120. and 461.

&c. &c. Vide Raym. 19. 342. C. C. C.

† *Sect.* 19. TENTHLY, By 9. Geo. 1. c. 22. commonly called The Black Act, “ If any person or persons shall forcibly rescue any person being lawfully in custody of any officer or other person, for any of the offences mentioned in the act, or if any person or persons shall by gift, or promise of money, or other reward, procure any of his majesty’s subjects to join him or them in any such unlawful act, every person so offending shall suffer death without benefit of clergy.”

Rescuing an offender on the Black Act.

† *Sect.* 20. ELEVENTHLY, By 2. Will. and Mary, sess. 1. c. 5. “ Upon any pound breach or rescous of goods and chattels distrained for rent, the person or persons grieved thereby shall, in a special action on the case, for the wrong thereby sustained, recover his or their treble (1) damages and costs of suit, against the offender or offenders in any such rescous or pound breach, any or either of them, or against the owners of the goods distrained, in case the same be afterwards found to have come to his use or possession.”

(1) The word *treble* refers to both costs and damages. Ld. Raym. 19. Skinn. 555. Carth. 321.

Salkeld 205. for when a statute increases damages where they were given before, the plaintiff shall have increased costs also as parcel of the damages. 2. Inst. 289. Str. 50. 974. Andr. 377. But to intitle a plaintiff to recover, he must shew he has complied with the directions of the statute, and conclude *contra formam statuti*. Ld. Raym. 342. For the form of an indictment where this offence is accompanied with an assault, vide Cro. Cir. Com. 117. 521.

CHAPTER THE TWENTY-SECOND.

OF ATTACHMENT.

HAVING shewn in what manner offenders may be apprehended without process from a court of record, I am now to shew in what manner they may be brought into court by such process.

OF PROCESS from a court of record there are two sorts.

1. Such as may be awarded by the discretion of the justices upon a bare suggestion, or their own knowledge, without any *Appeal, Indictment, or Information*.

2. Such as can be awarded only upon such accusations.

See 2. Scf.
Caf. 176.
1. Willf. 300.

F. Corody 4.

THE FIRST is generally called AN ATTACHMENT; and is properly grantable in cases of *contempts*, against which for the most part all courts of record generally, but more especially those of WESTMINSTER-HALL, and above all the court of king's bench, may proceed in a summary manner according to their discretion.

For contempts
in Chancery
vide 2. Com.
Dig. 39. to 42.
Rafal 268.
1. Bar. K. B.
110.
Raymond 3-6.
C. C. 1. 1-6.

1. Roll 325.
1. Bar. K. B.
353.

Salkeid 84.
8. Mod. 123.
Black. 892.

Sec 1. If the contempt happen to be done by a person present in the court, and it appear either from the confession of the party on his examination upon oath, or by the view or immediate observation of the judges themselves, the court may immediately record the crime, and commit the offender, and also inflict such farther punishment as shall seem proper.

And if such offences be done by a person not present in court, and be complained of by *affidavit*, the court will either make a rule on the party to attend at a certain day, in order to answer the matter of the complaint against him, or else will make a rule upon him to shew cause why AN ATTACHMENT should not be granted against him; or else, if the offence be of a very exorbitant nature, as for words of contempt of the court itself, will grant AN ATTACHMENT on the first complaint, without any such rule to shew cause.

2. **Str.** 1068. And the party who is ordered to attend the court in pursuance of such rule, ought regularly to appear in proper person, and not by attorney; as also must every one against whom AN ATTACHMENT is granted.

3. **Term Rep.** But the court will in no case issue an attachment against a party at the suit of another where the *affidavits* on which the motion is founded are sworn before the agent of the prosecutors.

And

And if the offence be of an heinous nature, and the person attending the court upon such a rule to answer it, or appearing upon an attachment, be apparently guilty, the Court will generally commit him immediately, in order to answer *interrogatories*, to be exhibited against him in relation to such contempt. But if there be any favourable circumstances to extenuate or excuse the offence, or if it appear doubtful whether the party be guilty of it or not, the Court will generally in their discretion suffer the party, having first given notice of his intention to the prosecutor, to enter into a recognizance to answer such interrogatories; and if no such interrogatories be exhibited within four days after such recognizance, will discharge the recognizance upon motion; yet if the party do not make such motion, and the interrogatories be exhibited after the four days, the Court will compel him to answer them.

3. H. 7. 6.
22. Ed. 4. 33.
34.
6. Modern 73.
See Rex v.
Horsley,
5. Term Rep.
362.

But in all the cases abovementioned, if the party fully purge himself upon oath, in his answer to such interrogatories of the whole matter charged upon him, the Court will discharge him of the contempt, and leave the prosecutor to proceed against him for the perjury, if he thinks fit: But if the party confess part of the contempts in his answer to such interrogatories, and deny others, the Court will not discharge him from the contempts so denied, but will proceed farther to examine the truth of them, and will inflict such punishment as from the whole shall appear reasonable: Neither will the Court discharge the party upon a shifting or evasive answer to any material part of the charge against him, but will punish him in the same manner as if he had confessed it (a).

The Queen
and Barber,
Mich. 12.
Anne,
6. Modern 73.
2. Jones 17 8
Douglas 498,
499.
3. Burr. 1329.
12. Mod. 348.
511.
Comb. 63.

(a) THE object of an attachment is to bring the party personally before the Court. On appearance he is permitted to enter into a recognizance with two sureties, in such sum as the Court shall direct, to appear and make answer, upon oath, to such interrogatories as shall be exhibited against him. Barnard K. B. 58. After the interrogatories are filed, and not before, the party may confess the contempt, unless in the case of a rescue, or for contempt in the face of the Court, 1. Black. 649. and submit to the mercy of the Court, 1. Black. 6. Otherwise examinations are taken thereon, and referred to the master of the crown-office to make his report. B. R. H. 23. But the party is not obliged to answer any interrogatories tending to convict him of any other offence, Strange 444. or which may subject him to a penalty. B. R. H. 239. Upon these examinations the master is to make his report, and the party is then, and not before, either acquitted of the charge, or adjudged in contempt, B. R. H. 23. and in the latter case, is either immediately sentenced or committed to the marshal, unless the Court wave giving judgment, and order the recognizance to be discharged, 3. Burr. 1256. or the Attorney-General consent that he may continue upon the recognizance to appear, under a rule of court, at some future time, 2. Burrow 797. 4. Burr. 2105. The master's report cannot be moved for the last day of Term, unless upon extraordinary cases, without permission of the Court, 1. Black. 311. such as in attachments for non-payment of costs, or not returning a writ, 1. Burrow 651. Nor will the Court grant a day-rule to one committed for a contempt, 1. Barnard K. B. 167.

NOTE. Motions and affidavits for attachments in civil suits are proceedings on the *civil side* of the court of king's bench until the ATTACHMENT issue, and are to be intitled with the names of the parties; but as soon as the attachments issue the proceedings are on the *crown side*, and from that time the king is to be named as the prosecutor. 3. Term Rep. 253.

But for the better understanding in what cases the court may proceed in the manner abovementioned against such offenders, I shall endeavour to shew,

I. Where it may so proceed against the ministers of the court.

II. Where against others.

As to THE FIRST of these points I shall consider,

1. Where it may so proceed against sheriffs, bailiffs of franchises, and sheriffs bailiffs.

2. Where against attornies, and others acting as such.

3. Where against other officers.

4. Where against jurors.

As to the first of these particulars I shall endeavour to shew,

1. Where the Court may so proceed against sheriffs, bailiffs of franchises, and sheriffs bailiffs, for not executing a writ.

2. Where for doing it oppressively.

3. Where for not doing it effectually.

4. Where for making a false return.

As to the first particular, *viz.* In what cases the court may proceed in the manner abovementioned against sheriffs, bailiffs of franchises, and sheriffs bailiffs, for not executing a writ.

Sett. 2. It seems clear from the general reason of the law, which gives all courts of record a kind of discretionary power over all abuses by their own officers, in the administration or execution of justice, which bring a disgrace on the Court themselves, as not taking sufficient care to prevent them, that wherever it shall appear, that any such officers have been guilty of any corrupt practice in not serving any writ—as where they refuse to do it, unless paid an unreasonable gratuity from the plaintiff—or receive a bribe from the defendant—or give him notice to remove his person or effects, in order to prevent the service of any writ, the Court, which awarded it, may punish such offences in such manner as shall seem proper by ATTACHMENT, &c. as well

well as the court of King's bench, which has a general superintendency over all crimes whatsoever (as the STAR-CHAMBER (a) had also formerly), but commonly leaves offences of this kind, in relation to causes in other courts, to be punished by such courts to which they more immediately belong (b). But if there neither appear to have been any palpable corruption in the case, nor particular obstinacy, as by disobeying a special rule of the court, in relation to the service of such writ, nor other extraordinary circumstances of wilful negligence, the judgment whereof is to be left to the discretion of the Court, it seems not to be usual to grant AN ATTACHMENT in such cases, but to leave the party to his ordinary remedy against the officer; which he may have either by serving him with rules to return the writ, &c. or by suing him for the damage sustained by his negligence, in an action of escape, or on the case, or by taking out an *alias* (c) and *pluries*, which if the sheriff do not execute, AN ATTACHMENT, directed to the coroners, goes against him of course, unless he give a good excuse for his not having done it. † And if the coroners do not execute the writ, the Court will, in the first instance, grant an attachment against them directed to *elizors* (d).

(a) Noy 101.

(b) 2. Bar. K. B. 277.

i. Vent. 11. Strange 567. Hob. 264.

Lafely v. West. ton. Sec F. Process, 13.

104.

(c) F.N.B. 38.

47. 265.

Finch 237.

264. 62, 263.

Hob

(d) 2. Bl. Rep.

912. 1218.

As to the second particular, *viz.* Where the Court may proceed in the manner above-mentioned, against a sheriff, or bailiff, &c. for an oppressive practice in the execution of a writ.

SECT. 3. It is every day's practice to grant attachments for misdemeanors of this kind, as for using needless force, violence, and terror, in making an arrest; or by breaking open doors where by law it is not justifiable, and there is no plausible excuse for doing it; or treating the persons arrested basely and inhumanly; or keeping them in custody till they consent to pay money for their deliverance; or making an arrest without due authority, as by force of a blank (e) warrant, filled up with the name of a special bailiff by the party himself, or bailiff, without the privity or subsequent agreement of the sheriff.

11. H. 6. 42,

43.

(e) Noy 101.

Moor 770.

2. R. Abr. 278.

Yet I have sometimes known attachments of this kind denied, in respect of the common use of the practice, which by experience hath been found to be almost necessary in some cases to prevent the defendant's having notice of the intended arrest; and therefore, if it shall appear to the Court, that there was any such reasonable cause for such a proceeding, it will be a great inducement to excuse, if not wholly to dispense with it.

As to the third particular, *viz.* Where the Court may proceed in the manner abovementioned against a sheriff, or bailiff, &c. for not executing a writ effectually.

1. Burr. 797.
Douglas 446.
2. Bar. K. B.
330.

(a) F. Process,
13. 32.

(b) Rastal 109.
Capias, pl. 20.
189. pl. 20,
21, 22.

670. pl. 2.
36. H. 6. 1.
Con.

B. Process 25.
F. Return de
Vicont. 35.

3. H. 7. 11.
47. Affize 6.

(c) F. Process
12. 14. 104.
121. 132. 135.
225.

Execution 101.
Return de Vi-
cont. 35.

27. Ed. 3. 83.

27. Ed. 3. 77.

Rastal 109.

Capias, pl. 20.

E. Process, 25.

39. Ed. 3. 3.

SECT. 4. It seems clear, that where any such officer is guilty of any corrupt practice in depriving the party who sues out a writ of that benefit and advantage which he ought to have from the execution of it, he is liable to be punished in the manner abovementioned; as if he levy the debt by virtue of an execution, and keep the money in his own hands, and embezzle it: But unless there appear some gross and palpable corruption in a sheriff neglecting to return a writ which hath been executed by him, or to bring in the body, or the money, &c. according to his return, the Court will hardly grant an attachment against him immediately, but will rather proceed against him by rules to return the writ, &c. and if he do not obey them, will increase the amercements upon him till he do, or perhaps grant an attachment for the contempt: And (a) if the sheriff return, that he sent the process to the bailiff of a liberty, who hath given him no answer, a *non omittas* shall be awarded to the sheriff: And if he return, that he sent the process to such bailiff, who hath returned a *cepi corpus*, or such like matter, and the bailiff bring not in the body or money, &c. at the day, by the better (b) opinion the bailiff shall be amerced, and a writ (c) shall issue to the sheriff, to distrain the bailiff to bring in the body, &c.

48. 113. 115. B. Return 96. 99. 5. Ed. 4. 14. 11. H. 4. 43. 38. E. 3. 1.
39. Ed. 3. 3. 8. H. 5. 2.

As to the fourth particular, *viz.* Where the Court may proceed in the manner abovementioned against a sheriff, &c. for making a false return to a writ.

(d) F. Process
5.

B. Surmise 19.

Return de

Brief, 100.

Rastal, Habeas

Corpus, 7.

SECT. 5. There seems (d) to be no doubt, but that where-ever any such officer endeavours to impose upon a court, by making a return to a writ of a matter known by him to be false, he is, in strictness, liable to be punished in this manner, for his contempt. Yet it seems, that the Court will not easily be prevailed on to proceed in this manner for a bare false return, but will rather leave the party injured by it to his remedy by an action on the case, unless there be some extraordinary circumstances of hardship or oppression; as where (e) an officer who had arrested one on a *capias*, returned, that he had taken him, but that the party was so sick, that he could not bring in his body at the day for fear of endangering his life, where in truth the party had been all the while in good health, and was only detained under such pretence, in order to extort money from him, &c.

(e) 11. H. 6.

42. 43.

Sayer 121.

Rex v. Sheriff
of Middlesex,
3. Term Rep.
133.

† And where a sheriff has been guilty of a contempt in the course of a civil suit, and the defendant afterwards dies, an attachment may still issue against the sheriffs for the prior contempt.

As

As to THE SECOND POINT, *viz.* In what cases the Court may proceed in the manner abovementioned, against attornies, and others acting as such; I shall endeavour to shew,

1. Where it may so proceed against them, for appearing for a person without sufficient authority.

2. Where for injustice to their clients.

3. Where for other contempts to the court, or dishonest practice.

As to the first of these particulars, *viz.* Where the Court may proceed, in the manner abovementioned, against ATTORNIES and others acting as such, for appearing for any person without sufficient authority. Vide Str. 422.

Sec. 6. There is no doubt (*a*) but that it may so proceed against them, for taking upon them to prosecute or defend a suit for another, without any manner of directions from him. Also if they have in truth a warrant from the party, but do not cause it to be recorded before judgment, it seems, (*b*) that they are in strictness liable to an attachment, for that the Court takes no judicial notice of any such warrant not of record; yet (*c*) if in such case it appear, upon examination, that the warrant of attorney happened not to be recorded through the negligence of the officer, or some such like accident, attended with no corrupt practice in the attorney, it seems, that the Court would never easily be prevailed on to proceed in this manner against the attorney; and much less at this day, since he is liable by statute (*d*) to a certain pecuniary forfeiture for every offence of this kind. (*a*) 38. Ed. 3. 8.
41. Ed. 3. 1.
Rastal 582.
16. Ed. 4. 5.
(*b*) Rastal 96.
(*c*) F. Judg.
96.
41. Ed. 3. 1.
38. Ed. 3. 8.
4. Ed. 4. 13.
16. Ed. 4. 5.
Rastal 582.
Burrow 654.
(*d*) Vide infra
sect. 9.

Sec. 7. For it is enacted by 32. Hen. 8. c. 30. made perpetual by 2. Edw. 6. c. 32. and by 18. Eliz. c. 14. and 4. & 5. Ann. c. 16. "That the plaintiff's attorney shall file his warrant the same Term he declares, and the defendant's attorney the same Term he appears; on pain of forfeiting ten pounds, and also suffering such imprisonment, as by the discretion of the justices of the court where any such default shall fortune to be, shall be thought convenient." Coke's En.
167.

Sec. 8. And it seems, that since these statutes, it hath not been usual to grant attachments in these cases, without some apparent circumstances of fraud, or other corruption. Vide Dyer
180.
Rastal 289.

Sec. 9. But howsoever a regular attorney may be excused from an attachment, for not having recorded his warrant, those have no reason to expect the like favour from the court, who take upon them to appear for others as attornies without having been admitted and sworn as such, for these

are liable to an attachment for every appearance, whether their warrant were recorded or not.

† And it is enacted, by 2. Geo. 2. c. 23. 22. Geo. 2. c. 45. perpetuated by 30. Geo. 2. c. 19. "That whoever shall in his own name, or in the name of another, act as an attorney or solicitor for reward, without being admitted and enrolled, shall forfeit 50l. to whoever shall prosecute, and be disabled from acting in either of those capacities.—And whoever, being admitted and enrolled, shall lend his name to any other not being admitted and enrolled, shall be incapable to act, and his admittance, &c. rendered null and void."

As to the second particular, *viz.* Where the Court may proceed in manner abovementioned against attorneys, and others acting as such, for injustice to their clients.

Rastal 93.
3. Atkins 568.
1. Bar. K. B.
101.
Savil 31.
Sec 4. H. 4. c.
18.
3. Jac. 1. c. 7.
Sayer 51.

Sec. 10. It is every day's practice to move for it against them, for base and unfair dealing towards their clients in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expences in order to raise their bills; or demanding fees for business which never was done; or for refusing to deliver up to their clients writings with which they had been intrusted in the way of business; or money which has been recovered and received by them to their clients use, and for other such-like gross and palpable abuses: But the Court will seldom grant an attachment for the detainer of such writings or money, without first making a rule on the attorney, to deliver them to the party. Also it will justify an attorney's detaining such writings or money for his security till he be paid all his just fees. Nor will it ever interpose in this manner as to any writings or money received by an attorney on any other account, except only in his way of business as an attorney, but will leave the party to his ordinary remedy by action.

Salkeld 87.
Str. 547. 621.
8. Mod. 359.
300. 102. 227.
243. 305.
2. Bar. K. B.
34. 263.

It is a contempt of court in an attorney to use reproachful words on delivering a declaration in ejectment. Strange 576. Or to assign the death of a plaintiff in ejectment for error. Strange 899. Or to bring a fictitious action. L. Hard. Ca. 237. 8. Mod. 109. Or to issue process on a person attending his business in the court. Andr. 275. Strange 1093. Or to arrest one attending arbitrators under a rule of court. Black. 1110. Or to refuse answering questions by the Court. Strange 1197. Wilk. 30. Or to undertake to appear and then not appearing. L. H. Cases 131. Vide Com. Dig. Tit. Attorney, b. 13. 15. Or to refuse to prove the execution of a deed to which he is a subscribing witness. Cowper 845. Or to let an argument go on, in order to obtain the opinion of the Court after the parties have privately agreed. Strange 420. Or to alter the name in a sheriff's warrant. 1. Black. 2. Or for signing a Counsel's name to a bill in equity without his consent. Fawcett v. Garford, Trinity, 29. Geo. 3. And if he has neglected to attend the Court after order so to do, he shall be immediately committed and answer interrogatories *in vinculis*. 2. Bar. K. B. 219. And for any ill practice attended with fraud and corruption, the Court will order the party to be struck off the roll. Freem. 74. Black. 991. But this does not create a perpetual disability, for he may be again restored. Blackstone 222.

Sec.

As to the third particular, *viz.* Where the Court may proceed in the manner above-mentioned against attornies, and others acting as such for other contempts to the Court, or dishonest practice.

4. Hen. 4. c. 18.
Freem. 74.
4. Mod. 367.
6. Mod. 16.
187.

Sett. 11. It seems, that it may not only proceed in such manner against them for disobedience of its rules, after notice given them of such rules, either expressly or impliedly; but also, for any such ill practice as is against the known and obvious rules of justice and common honesty; as for forging (a) a writ, or any other matter of record, (b) or but attempting to do it; or for taking out a *capias*, (c) which has no original to warrant it; or for receiving (d) money of the client for suing out an original, and also for the fine due thereon to the king, where, in truth, no original has been sued out, nor any fine paid to the king; or for endeavouring to impose upon the Court; as (e) by causing an action to be brought against one in it by collusion, without any just ground, in order thereby to intitle the party to the privilege of the Court, and afterwards, upon the examination of the matter in court, giving a false account of it; or (f) for giving directions to a sheriff concerning what persons he should return on a panel; and for other misdemeanors of the like nature.

(a) C. Car.
22. 74.
Dyer 241.
244.
(b) F. Attach.
7.
(c) 20. H. 6.
37.
F. Attach. 3.
(d) C. Car.
52. 74.
(e) 16. Ed.
4. 5.
1. Burn 20.
Vide 12. Geo.
2. c. 13.
12. Geo. 1. c.
29.

B. Privilege. 43. (/) Moor 832. 3. Burr. 1564. Vide 1. Black. 2.

As to THE THIRD POINT, *viz.* Where the Court may proceed in the manner abovementioned against other officers of the court.

Sett. 12. There being scarce any thing of this kind to be met with in the books, I shall only observe, that it seems clear, from the general reason of the law, which gives all courts of record a kind of discretionary power in the government of their own officers, that any such court may proceed in such manner against any such officer, not only for refusing to execute its commands, or for executing them irregularly, remissly, (g) or oppressively, but also for all kinds of oppression or injustice done by them in the execution of their offices, or by colour of them.

2. Bar. K. B.
254.
Vide sup. sect.
1.
F. Off. del
Court, 12.
Raft. 329. 268.
Dyer 218.
(g) F. Tref. 73.
33. H. 6. 55.
b. 56.

As to THE FOURTH POINT, *viz.* In what cases the Court may proceed in the manner abovementioned against jurors.

Sett. 13. It is observable, that jurors may be considered either in a ministerial capacity, *viz.* as persons bound to attend the court, in order to perform the duty for which they

are returned, until they shall be discharged; or in a judicial capacity, *viz.* as judges of the fact which is to be tried or inquired by them.

And therefore, for the better understanding of this matter, I shall consider,

1. How far JURORS are punishable in the manner above-mentioned in their ministerial capacity.

2. How far in their judicial.

As to the first particular, *viz.* How far jurors are punishable by *attachment* in their ministerial capacity.

It seems clear, that jurors are punishable in the manner abovementioned in their ministerial capacity, in the following instances.

48. Ed. 3. 30. *SECT. 14.* FIRST, For making default. As where more than one of the persons returned on a jury do appear, but not a sufficient number to take an inquest, and some (a) of the others come within view of the court, or into the same town (b) in which the court is holden, but refuse to come into the court to be sworn; in which cases, upon proof of such matter, the Court (c) may, at the prayer of the party, order the jurors who appeared, to inquire what is the yearly value of such defaulters lands, and after such inquiry made, either summon them to appear, on pain of forfeiting such sum as their lands have been found to be worth by the year, or some lesser (d) sum, or impose (e) a fine of the like sum upon them, without any farther proceeding. But it seems, (f) that such juror shall be liable to lose his issues only for such default, and not the yearly value of his lands, unless the party pray it. But a juror (g) who hath actually appeared, and after makes default, is said to be subject to such forfeiture of the yearly value of his lands, whether the party pray it or not, because his contempt appears to the Court by its own record; yet (h) even in this case, the Court, in discretion, will sometimes only impose a small fine. Also it is said, that no juror shall be subject to such penalty, where (i) the inquest could not be taken, if he had appeared; as where but five of the jurors summoned on an affize, have had a view of the land. Also it seems (k) that a juror who makes a default without ever coming into the town wherein the court is holden, is liable only to lose his issues, or to be amerced, but not to be fined: And it is said, that he shall neither (l) be fined nor amerced, (m) 10. E. 4. 19. (n) 10. E. 4. 19. 30. Affize 17. Qu. 48. E. 3. 12. 12. Affize 14. F. Affize 65.
- (a) Raft. 267, 268.
(b) Raft. 267.
(c) Aff. 3. 42.
(d) Ed. 3. 30.
(e) B. Jurors, 25, 26.
(f) Affize 11.
(g) Raft. 267, 268.
(h) Ed. 4. 37.
(i) H. 4. 5.
(j) Affize 11.
(k) Co. 41.
(l) Raft. 267.
(m) Raft. 267, 268.
(n) F. Peine, 1, 2.
(o) Affize 42.
(p) H. 6. 7.
(q) Ed. 4. 36, 37.
(r) H. 6. 27.
(s) B. Jurors, 15, 18, 26.
(t) Enquest, 42.
(u) F. Chal. 47.
(v) H. 6. 27.
(w) F. Office de Court, 12.
(x) F. Peine, 3.

if the defendant be effoined on the day on which the jury was to appear, for that his appearance in such case would be to no purpose. And it seems (a) questionable whether a juror be amerciable for not appearing at the return of a *sicut alias venire facias*, where the first *venire* was not served. Neither doth a juror seem to be amerciable at all, at the day of the return of the first *venire* (b) *facias*, except before *justices errant*, or of *oyer and terminer*, &c.

(a) 1. H. 7. 8.

(b) F. Aff.

136. 466.

11. Affize 7.

B. Amerce 68. See the chapter of Process against Jurors.

Seff. 15. SECONDLY, For refusing to be sworn when they do appear. For which, as it seems, (c) every court of record may, of common right, impose such a reasonable fine on any one returned on a grand or petit jury, as shall seem convenient.

(c) 2. Inst. 242.

44. Ed. 3. 19.

8. Co. 38.

7. H. 6. 12.

Seff. 16. THIRDLY, For refusing (d) to give any verdict at all.

(d) Vaugh.

152.

Noy 49.

3. Bulst. 173. 9. H. 6. 44.

Seff. 17. FOURTHLY, For endeavouring to impose upon the Court; as where (e) a petit jury offer a verdict to the Court, as agreed to by their whole number, where, in truth, some of them have not agreed to it: Or where (f) they agree upon two verdicts, and first offer one of them to the Court, and to stand to it, if the Court shall express no dissatisfaction to it, but if the Court shall dislike it, then to give the other.

(e) 29. Aff.

27.

B. Jur. 28.

40. Affize 10.

1. R. Abr.

219.

(f) Cro. Eliz.

779.

Or if a jury

cast lots for their verdict. 3. Keb. 805. 2. Levinz 140. 205. 2. Jones 83. Str. 642.

Seff. 18. FIFTHLY, For misbehaving themselves after their departure from the bar; as where they (g) do not all keep together till they have given their verdict; or where any (h) of them carry any thing eatable with them in their pockets; or eat, (i) or drink, or otherwise refresh themselves without leave from the Court, before they have given their verdict, though they were agreed (k) on it, and were also all the time in the custody of the bailiff appointed to take care of them.

(g) 14. H. 7.

29. 30.

Vaugh. 151.

(h) Dyer 78.

(i) Dyer 218.

Vaugh. 152.

C. Jac. 21.

F. Exam. 17.

B. Jur. 13.

(k) Raft. 268.

Dr. & St. 158.

1. Inst. 227. 2. Hale 296.

Seff. 19. SIXTHLY, For sending (l) for, or receiving (m) instructions from either of the parties concerning the matter in question, and therefore (n) much more for receiving a bribe.

(l) Raft. 329.

Hobart 114.

F. Exam. 17.

1. Inst. 227.

2. Hale 296.

(m) 40. Aff. 43.

See Book 1. c. 72. sect. 4. 2. Hale 160, 161. 310. to 313. 5. Ed. 3. c. 10. 34. Ed. 3. c. 8. 38. Ed. 3. c. 12. Ld. Raym. 407.

As to the second particular, *viz.* How far jurors are punishable in the manner abovementioned in their judicial capacity.

- Sec. 20.* It seems to be the current opinion of the old books, that jurors are not subject to any prosecution for a false verdict, except by way of attain: And there seem to be very few ancient precedents for the punishment either of a grand or petit jury, merely for giving a verdict against evidence, or the direction of the Court, either in a criminal or civil matter. It is said (a) indeed in *Fitzherbert's Abridgment* of a case in the time of king *Richard the Second*, that the judge told the jury, upon their acquitting a common thief of an indictment, that they should be bound to their behaviour for their lives; but this was only the sudden opinion of a judge, and it doth not appear, that the jurors were afterwards actually so bound in the pursuance of the said opinion; and *Fitzherbert* makes a *quære* in his *Abridgment* of the case, by what law they could be so bound:
- (a) F. Cor. 108. Vaugh. 152. And as to those three (b) other cases in the time of king *Edward the Third*, wherein it is said that a juror was committed for refusing to agree with the other eleven, it may be answered, that it is said (c) in the first of those cases, "that such juror stayed his companions a day and a night, without agreeing with them, and this without a reason;" from whence it is reasonable to intend, that there might be some circumstances of misbehaviour, as an obstinate perverse resolution, right or wrong, to find a verdict one way, and not to consult with the other jurors, nor hear their reasons, &c. And in the last of the (d) said cases it is said, that the "juror committed by the justices of assize, for refusing two days and a night to agree with his companions, and saying, that he would rather die in prison than agree with them, was afterwards discharged by the justices of the common bench, upon the adjournment of the assize thither."
- (b) F. Imprif. 4. Judgment 89. Verdict 40. (c) 8. Assize 35. Vaugh. 151. Jones 16, 17. And it was part (e) of the charge against *Empton*, who was indicted in the beginning of the reign of king *Henry the Eighth*, for a great complication of offences, that he had committed a jury to ward, and bound them to appear before the king and his council, and afterwards on their appearance fined them (though with the concurrence of the rest of the council) in the sum of eight pounds a-piece, for refusing to find a person guilty of an indictment of larceny, upon sufficient evidence; yet it is said in *Dalison's Reports* of cases in the third and fourth years of *Philip and Mary*, that it was agreed, that justices of assize, *oyer and terminer*, gaol-delivery, or the peace, have no power indeed to assess fines on jurors who make a false oath before them, but that they may give them a day before themselves, or the
- (d) 41. Assize. 41. Ed. 3. 31. Vaugh. 151. (e) Raym. 88. 89. (f) Dalison 18.

the king's council; by which it seems to be implied, that such jurors were then thought to be some way or other punishable by such judges, or at least by the king's council; for otherwise it would be to little purpose to bind them to appear before them. Also it seems to be holden by *Sir Edward Coke*, (a) that though a jury be no way punishable for convicting a man upon an indictment against evidence, yet they might be charged in the star-chamber for their partiality in finding a manifest offender not guilty: And about (b) the latter end of the reign of *queen Elizabeth*, a jury was committed and fined, and bound to their good behaviour, for finding one *Wharton* guilty of manslaughter only, against clear evidence and the direction of the Court, upon an indictment of murder: And it is said in *Palmer's* (c) *Reports*, that jurors, who go against the directions of the Court are to be fined: And there are several instances in the beginning of the reign of king *Charles the Second*, wherein it was resolved, that both grand (d) and petit (e) juries were finable by the justices of gaol-delivery, for going against plain evidence, and the directions of the Court.

(a) 12. Co.
23, 24.

(b) Yelv. 23.
Noy 48, 49.

(c) Palmer
363.

(d) 1. Sid.
229, 230.

2. Keb. 180.

(e) 1. Sid.
272, 273.

Raym. 88, 89. 133. 1. Keb. 769. 938. 1. Keb. 404.

But these proceedings were always thought grievous, and were complained (f) of in the HOUSE OF COMMONS; and this question was at last fully considered and debated in *Bushel's Case*, who having been committed by the justices of oyer and terminer at THE OLD BAILEY, brought his *habeas corpus*, in the court of common pleas; to which it was returned, that he was committed for the fine of forty marks, imposed on him for having, with other jurors, acquitted certain defendants of an indictment for an unlawful assembly, against full and manifest evidence, and against the direction of the Court in matter of law; and upon this return he was discharged, and the return was adjudged insufficient, for not setting forth particularly (g) so much of the evidence that it might appear that it was full and manifest; and likewise (h) for not setting forth, that the defendant did know and believe it to have been full and manifest; and also (i), for not shewing what the direction of the Court was, and in what manner the defendant found against it. And it was also resolved, (k) that petit jurors are in no case finable for giving a verdict against the evidence delivered in court, whether they be liable to an attainr for such verdict or not, not only for that the jury are by law the proper judges of matter of fact, as the judges are of matter of law, and therefore ought to be free in their judgment of it, with-

(f) 1. Sid. 133.

2. Keb. 180,

181.

Tr. per Pais

225.

Vaugh. 135.

(g) Vaugh.

142.

2. Jon. 16, 17.

(h) Vaugh.

142.

2. Jon. 16, 17.

(i) Vaugh.

143.

(k) Vaugh.

144, 145.

3. Keble 352.

2. Jones 16.

Vide Hob. 114.

Co.

3. Keble 352.

1. Inst. 226. 2. Hawk. c. 47. sect. 18.

out being over-ruled by the judges, who, strictly speaking, have no more to do with the judgment of *the fact*, than the jurors have with the judgment of the matter of *law*: neither is it possible that a judge can certainly know that a juror acts corruptly in giving his verdict contrary to the strength of the evidence delivered in court; for he may be influenced by his own personal knowledge of the truth of the fact, of the credit of the witnesses, the reputation of the parties, and many other circumstances unknown to the judge, and well known to the jury; for which cause the law provided, that all issues should be tried by the neighbourhood of the place in which they are supposed to arise, because neighbours are presumed to have better knowledge than others of what concerns their neighbours. And for these causes, and other such like, the court of king's bench granted an information against a town-clerk, for publishing an order of the court against jurors, who had found a person guilty of manslaughter only, upon an indictment of murder, by which order the said jurors were declared to be justly suspected of bribery, and declared incapable of holding an office, &c.

Tr. per Pa.
209. 279.
1. Ventris 67.
1. Salkeld 405.
Hil. 10. Ann.
Q. v. Wake-
field.

Sett. 21. Yet if it shall plainly appear in any case, that jurors are perfectly satisfied of the truth of a fact, whereupon they declare to the Court, that they find it in such a particular manner, and the Court directly tell them, that upon the fact so found, as they have agreed it to be, the judgment of the law is such or such, and therefore that they ought to give a verdict accordingly, yet they obstinately insist upon a verdict contrary to such a direction; it seems agreeable to the general reason of the law, that the jurors are finable by the Court in such a case, unless *an attaint* lies against them; for otherwise they would be dispunishable for so palpable a partiality, in taking upon them to judge of matters of law, which they have nothing to do with, and are presumed to be ignorant of, contrary to the express direction of one who by the law is appointed to direct them in such matters, and is to be presumed of ability to do it.

2. Jones 15, 16.
Vaughan 144.
Palm. 363.
Co. Lit. 228.
Ld. Ray. 470.
2. Hale 309.
315.

Sett. 22. Also if a judge, for the better direction and information of a jury, shall ask them their opinions concerning such a particular fact, and they shall refuse to answer him, and obstinately insist to deliver in their verdict as they think fit, contrary to his direction, it seems questionable, whether they may not be fined in such a case also, unless *an attaint* lie against them, for that it is the duty of jurors to take the advice and information of the Court, in order to be governed by it as far as shall be consistent with their consciences.

Braet. 288,
289.
2. Jones 15, 16.
Vaughan 144.

Sett. 23. Also, if a jury shall refuse to find an office for the king, upon full evidence, it hath been holden, that they may be fined, for that in such case they are not liable to an attain, and their finding does not determine any man's right, and the king, in many cases, hath no other remedy. Yet it seems questionable, how far at this day these reasons may be thought conclusive; and it seems, that they hold as strongly for the punishment of grand jurors refusing to find an indictment of high treason; and yet it will be hard to maintain, that such jurors are any way punishable for such a refusal.

Moor 730.
3. Leon. 148.
Vaughan 153.

9. H. 6. 44.

Sett. 24. But if a petit jury in a leet conceal a matter presentable by them, it is a good custom that they may be amerced for such concealment, being found by the grand jury; and by 3. Hen. 7. c. 1. set forth more at large book 1. c. 59. f. 1. "If an inquest conceal any matter in-quirable before justices of peace, another inquest may be impanelled to inquire of such concealments, and the concealers may be amerced by the discretion of such justices."

9. H. 6. 44.

HAVING shewn in what cases the ministers of the court are punishable in the manner above-mentioned, I am now to shew in what cases others may be so punished; and for this purpose I shall endeavour to shew,

1. Where inferior judges are punishable in such manner.

2. Where counsellors.

3. Where gaolers.

4. Where any person whatsoever.

As to THE FIRST POINT, *viz.* Where inferior judges are punishable by attachment, I shall endeavour to shew,

1. Where inferior judges are in such manner punishable, for proceeding without jurisdiction.

2. For proceeding unjustly, oppressively, or irregularly.

3. For refusing to do justice.

4. For contempts of superior courts.

As to the first of these particulars, *viz.* In what cases inferior judges are punishable in the manner abovementioned for proceeding without jurisdiction.

- (a) 41. Aff. 30. Salkeld 201. 1. Keble 484. Palmer 564. Far. 1. 38. 84, 85. *ScH.* 25. It seems, (a) that the court of king's bench having a general superintendency over all inferior courts, may, in strictness, award an ATTACHMENT against any such court usurping a jurisdiction no way belonging to it, and putting the subject to unnecessary vexation by colour of a judicial proceeding wholly unwarranted by law, and therefore (b) prohibited by it. Yet in these cases it seems to be rather the more usual (c) way, first to award a writ of prohibition to such Court, and afterwards an attachment upon its proceeding after such prohibition, and not to grant a rule to shew cause why an attachment should not go in the first instance, unless there be some extraordinary circumstances in the case; as where (d) the steward of a lect is guilty of a double usurpation, as of holding plea of a matter which arose out of his precinct, and which, if it had arisen within his precinct, would not have been within the jurisdiction of his court; or where (e) the judge of an inferior court refuses to receive a plea that the cause of action arose out of his jurisdiction; or where (f) any judge takes cognizance of a cause to which he himself is a party; or where the judge of a court baron is, privy to a practice of splitting (g) a cause of action for more than forty shillings into lesser sums, in order to bring it within the jurisdiction of the court. But in this last case, there seem to be more instances (b) of prohibitions than attachments; and in the cases above-mentioned, and all others of the like nature, it seems to lie wholly in the discretion of the Court to grant either.
- (b) 19. H. 6. 54. 2. R. Abr. 317. 6. Modern 90. 2. Keble 617. 1. Ven. 67. 73. 1. Keble 484. 1. Siderfin 464.
- (c) Register 145, 146. F. N. B. 239. 2. Siderfin 464. 6. Modern 90. 2. Inst. 312. 2. R. Abr. 317.
- (d) 41. Affize 30. F. Leet 9. B. Leet 18. 31.
- (e) Vaughan and Hodges, Paschæ 11. Annæ.
- (f) Salkeld 201. 396. Farres 1, 2. (g) Palmer 564. 1. Keble 484.

As to the second particular, *viz.* In what cases inferior judges are punishable in the manner abovementioned for acting unjustly, oppressively, or irregularly.

ScH. 26. It is not easy to meet with cases of this kind in the books, there being seldom any thing in them so remarkable as to be thought worth reporting. But it seems to be a common practice, to grant attachments against the judges of such courts for any practice contrary to the plain rules of natural justice, though it have been never so long used in such courts; as for denying a defendant a copy of the declaration against him, and going on to trial; or giving judgment against him, without giving him any manner of notice,

notice, or time to make his defence; or for taking of unreasonable (a) distresses, either on mesne process, or execution; or for compelling (b) a defendant to give exorbitant bail; or for proceeding contrary to the prohibition (c) of a statute, as (d) by amercing a clergyman according to his spiritual benefice; or by assessing (e) an amercement without any assentment by the tenants of the manor; or by (f) taking money of a plaintiff or defendant for vicious pleading.

(a) Salk. 201.
3. Keble 92.
(b) 2. Jones
178.
(c) F. N. B.
76. 160. 165;
166. 270.
9. H. 6. 61.
19. H. 6. 54.
(d) F. N. B.
76.
F. Attach. 8.

(e) F. N. B. 76. (f) F. N. B. 270. 2. Inst. 122.

As to the third particular, viz. In what cases inferior judges are punishable in the manner abovementioned for refusing to do justice.

SECT. 27. It seems clear, from the general reason of the law, and the common practice of the court of king's bench in cases of this nature, that the said court may in its discretion award an attachment against any such judge, obstinately and perversely, and without any colour of a reasonable excuse, refusing to proceed at all, or to give judgment, or award execution, in a matter brought regularly before him; for all such delays of justice are not only grievous to the suitor, but bring a disgrace upon the law itself.

Yet if there be no extraordinary circumstances in any such delay, to bring the judge under a reasonable suspicion of corruption, it seems the more usual method to take out a writ to such judge, commanding him to do the thing, of the delay whereof you complain, and if such writ be not obeyed, to take out an *alias* and *pluries*, or to take (g) out the *alias* and *pluries* together with the first writ, and thereupon, if the judge refuse to comply, to take out an *attachment* against him at the suit of the king and of the party, which may either be returnable into the court of king's bench, or, at the party's election, into the court of common pleas, except in some special (h) cases. And this seems (i) to be the proper remedy to compel the lord of a manor to hold a court for the determining of a *writ of right patent*, or a *writ (k) of right close*; or to compel the judge of any inferior court, whether of record (l) or not, to proceed (m) in a plea, or to give judgment (n) or to award execution (o).

(g) F. N. B.
68.

Infra sect. 34.

(h) F. N. B.
62. 230. 63.

67. 13. 14.

(i) F. N. B.

3. 13.

(k) F. N. B. 12.

(l) Raftal 83.

F. N. B. 20.

153. 243.

(m) F. N. B. 12, 13. Raftal 83. (n) F. N. B. 153. 243. (o) F. N. B. 20

As to the fourth particular, *viz.* In what cases inferior judges are punishable in the manner abovementioned for contempts of superior courts.

Sec. 28. There is no doubt but that justices (a) of peace, or commissioners (b) of sewers, may be so punished for proceeding in any matter before them, after a *certiorari* delivered to them; or the judge of a spiritual (c) or civil (d) law court, for proceeding in a cause after notice of a rule to shew cause why a prohibition should not go; or a judge of any inferior common law court, for proceeding in a cause after a *habeas corpus*, or writ of error allowed; or a sheriff, (e) for proceeding in replevin, or other cause, in the county-court, after a *superfedeas*, *pone*, or *recordare*. Also a rule (f) has been granted to shew cause why an attachment should not go against the steward of a wapentake for proceeding after a *sole*, though this be only a contempt to the county-court.

(a) Moor 677.
Yelv. 32.
1. Keble 93.
(b) 11. Mod.
44.
(c) 2. Jones
47.
(d) 1. Roll.
315.
(e) F. N. B.
13, 14.
F. Replev. 31.
43 Ed. 3. 26.
F. Process,
168.
Att. le Case,
29
(f) Burgh
and Blunt. Hil. 3. Geo. 1. 10. Modern 349.

Sec. 29. Also justices of peace may be punished in the manner abovementioned for acting in a contemptuous manner against the determination of the court of king's bench; as where an order of settlement, specially setting forth the circumstances of the case, is removed into the said court, and quashed there, by the judgment of the Court, upon the merits; and yet the justices of peace afterwards make another order to remove the same person to the same place, for the very same cause, without regarding the judgment of the Court, though it were well known to them, and insisted on by the parties.

As to THE SECOND POINT, *viz.* In what cases COUNSELLORS are punishable in the manner above-mentioned.

Sec. 30. It seems clear, that notwithstanding they are neither officers of any court, nor invested with any judicial office, but barely practise as counsellors, yet inasmuch as they have a special privilege to practise the law, and their misbehaviour tends to bring a disgrace upon the law itself, they are punishable for any foul practice as other ministers of justice are.

6. Modern
137.
1. Hawk. c.
83. s. 27.
3. Burrow
1256.

As to THE THIRD POINT, *viz.* In what cases gaolers are punishable in the manner above-mentioned.

Sec. 31. It seems clear, that they are not only punishable in this manner, as all other officers are, by the courts to which they more immediately belong, for any gross misbehaviour in their offices, or contempts of the rules of such courts, but they are also punishable by any other courts for disobeying writs of *habeas corpus* awarded by such courts, and not bringing up the prisoner at the day prefixed by such writs. Also
it

It seems clear, (a) that it is no excuse for not obeying a writ of *habeas corpus ad subjiciendum*, that the prisoner did not tender the fees due to the gaoler: Also (b) it seems to be the better opinion, that the want of such a tender is no excuse for not obeying a writ of *habeas corpus ad faciendum et recipiendum*: However (c) it is certain, that if the gaoler bring up the prisoner by virtue of such *habeas corpus*, the Court will not turn him over till the gaoler be paid all his fees; (d) nor, as some (e) say, till he be paid all that is due to him for the prisoner's diet; for that a gaoler is compellable (f) to find his prisoner sustenance; but this is denied by others (g).

(a) 1. Keble 272.
(b) Varch 89.
1. Keble 280.
2. Jones 278.
Con.
1. Keble 566.
(c) 2. Jones 178.
(d) 2. R. Abr. 32.
(e) 1. Roll. 338, 339.
Con. •
2. R. Abr. 32.
Strange 532.

(f) Co. Lit. 295. 9. Coke 87. (g) Plowden 68. 2. R. Abr. 32.

SECT. 32. Also it seems, that the court of king's bench, which has a general (b) superintendency over all persons who are in any respect ministers of justice, may award an ATTACHMENT against any gaoler using a prisoner barbarously and inhumanly. Yet it is said, (c) that a gaoler is no way punishable for keeping a debtor in irons. And it seems agreed at this day, that a gaoler shall not be punished in the manner above-mentioned, for the bare escape of a person in his custody by civil process, but that the party grieved by such escape ought to take his remedy by action.

(b) 6. Mod. 137.
(c) 2. Inst. 381.
2. R. Abr. 806, 807.
3. Modern 226.
3. Coke 44.

As to THE FOURTH POINT, viz. In what cases any person (1) whatsoever is punishable in the manner above-mentioned.

(1) An attachment also may be granted against a person for threatening a *prosecutor*, who has indicted another for perjury in an affidavit on which an information had issued against *him*, with danger of his life, &c. 1. Wilson 75.—It lies also against a witness, material to the cause, who absents himself without any excuse. Douglas 540. Strange 810. Lord Raymond 1528. provided the *subpoena* be served upon him in reasonable time, Strange 520. personally and not given to a servant, B. R. H. 313. and a proper sum to defray his expences tendered, Strange 1150. 1054. or a promise of them made which he accepts, Cro. Car. 540.—But not where a witness did attend, although too late, he not being able to give other evidence than what was given by another witness B. R. H. 170. and the count of exchequer refused it where a witness went away after attending two hours, although by that means the plaintiff was non-suited, Bunn 142.—Vide also 3. Burr. 1329.

SECT. 33. It seems, that even peers of the realm, whether spiritual or temporal, are liable to such punishment for some contempts, as for rescuing (k) a person arrested by due course of law, or for proceeding in a cause against (l) the king's writ of prohibition, or for disobeying other (m)

(k) F. Process 114. 161.
(l) Ret. Vicount, 74.
1. H. 5. 14.

Dyer 212. 27. H. 8. 22. Crom. Jur. 1A. (l) 21. Ed. 3. 3. (m) 2. R. Abr. 278. 234. 8. Ed. 4. 17. Vide 25. Ed. 3. c. 6. F. N. B. 42. F. Q. non admittit, 7. B. Contempt 5. 8. Coke 60.

(a) 11. H. 4. writs, wherein the king's prerogative, or the liberty (a) of the subject are nearly concerned. But it doth (b) seem clear, that it is a certain general rule, that a peer is punishable in this manner for disobedience of all writs whatsoever. And it seems (c) certain, that no peer is liable to an attachment for not appearing on a jury. Therefore it seems, that what is said (d) in some Books in general, that an attachment lies against peers for contempts, ought to be understood of such only as are of an enormous (e) nature, as those above-mentioned, and others (f) of the same kind, about which it is difficult to lay down any certain particular rules (2). However it is certain, that all other persons are liable to an attachment for contempts, all the particular instances whereof it would be endless to enumerate.

(d) F. Procefs 198.
 C. Eliz. 170.
 2. R. Abr. 234.
 B. Contempt 3. 19.
 6. Coke 54.
 Finch 355.
 (e) Dyer 315.
 Hobart 61.
 21. Ed. 3. 59.
 Rastal 313.
 1. Wilfon 332.

29. Affize 33. (f) C. Eliz. 170. 503. 1. R. Abr. 220, 221. 3. Inst. 142.
 8. Modern 192. Sayer 50.

(2) An attachment lies against a peer for refusing obedience to a *habeas corpus*, 1. Burr. 634. 1. Wilfon 332. Vide Lords Journals, 8. June 1757. But no attachment lies against a corporation in contempt; the mode of compulsion is by sequestration, &c. Cowp. 377.

The most remarkable instances of contempts seem reducible to the following heads.

1. Contempts of the king's writs.
2. Contempts in the face of a court.
3. Contemptuous words or writings concerning the court.
4. Contempts of the rules or awards of the court.
5. Abuses of the process of the court.
6. Forgeries of writs, and other deceits of the like kind, tending to impose on the court.

As to the first particular, *viz.* Where persons are punishable in the manner above-mentioned for contempts of the king's writs.

Secf. 34. It seems that it may reasonably be argued, that all such writs, being in the king's name, and importing some lawful command or prohibition from him, which every subject is in duty bound to obey, every disobedience (g) of

(g) 1. Mod. 44.
 3. Modern 314. F. Q. non admittit 7.

any

any of them being a contempt of the king's authority, is, in strictness, punishable in the manner above-mentioned, if the Court in discretion shall think fit so to proceed: Yet it doth not seem to have been usual for the Court to proceed in this manner for a bare nonfeasance, in not performing the command of the first writ in any case whatsoever. But (a) it seems clear, that an attachment lies of course for the non-performance of the demand of a *pluries*, which may in some cases, if not in all, be taken out, together with the *alias*, at the same time with the first writ: Also it seems, that the Court may in any special case, in which it shall seem proper, make a rule to compel the party to whom the first writ is directed, to execute it; and if such rule shall be disobeyed, there can be no doubt but that the Court may proceed against such disobedience in the same manner as they usually do against the disobedience of any other rule: Also it seems (b) to be the common practice to grant attachments upon affidavits of contempts to the king's writs, by acting contrary to the purport of them (3). Also there can be no doubt, but that if a sheriff shall in any case return to the Court, that a person arrested (c) or goods seized, (d) or possession of lands delivered (e) by him, by virtue of the king's writ, were rescued or violently taken from him, &c. the Court may award an attachment against the rescuers. Also it is certain, that the Court hath, in some cases, awarded an attachment upon affidavits of rescous, where the officer hath not returned one. Yet this was anciently (f) looked on as irregular, and of late the Court has refused to grant an attachment in any case for a rescous, unless the officer will return it; for that it hath been found by experience, that officers will often take upon them to swear a rescous, where they will not venture to return one.

6. Modern 27. (f) F. Suggest. 25.

(3) Therefore an attachment may be granted for making an insufficient return to the first writ of *Habeas Corpus* without issuing an *alias* and a *pluries* writ, *Rex v. Winter*, 5. Term Rep. 89.

As to the second particular, *viz.* Where persons are punishable in the manner above-mentioned, for contempts in the face of the Court.

Sec. 35. It seems clear, that all persons are punishable in this manner, not only for making an actual breach of the peace, but also for any heinous misdemeanor in the face of the Court; as (g) for giving false, trifling, and contradictory answers upon an examination in court concerning one's ability to be bail for another, in an action depending in the court, or concerning any other such like matter in

(a) F. Sugg. 25.
43. Affize 39.
Rastal 457.
Finch 237.
11. H. 4. 86.
F. Count 34.
Suggest. 25.
F. N. B. 68.
Sup. f. 27.
1. Black. 269.

(b) F. N. B. 65. 166. 270.
173. 174. 175.
F. Suggest. 9.
8. Coke 62.
Sup. f. 33.
(c) F. Attach. 6.
F. Process 56.
F. Ret. Vi-count, 74.
37. H. 6. 27.
Dyer 212.
4. Burrow 2130.
2. Jones 39.
(d) F. Attach. 5.
33. Edw. 3. 9.
(e) Salk. 321.
(f) Black. 64C.

(g) C. Car. 145.
7. H. . 25.

question before the Court, and to be determined by the examination of the parties: or (a) for any contemptuous behaviour towards any judge in the face of the court, as by charging him with injustice, and praying for an information against him, &c.

As to the third particular, *viz.* Where persons are punishable in the manner above-mentioned for contemptuous words or writings, concerning the Court.

Sect. 36. It seems needless to put any instances of this kind, which are generally so obvious to common understanding; and therefore I shall only observe, that sometimes attachments have been granted for contemptuous words concerning the rules of the Court, without making any rule to shew cause why such attachments should not be granted, because it would be vain to serve him with a second rule who has despised the first.

43. Affize 39. As to the fourth particular, *viz.* Where persons are punishable in the manner above-mentioned, for contempts of the rules or awards of the Court.

Sect. 37. There is nothing more frequent than to proceed in this manner for contempts of this kind; as where (b) a defendant in an action of account, being adjudged to account before auditors, refuses to do it, unless they will allow such an acquittance, which was disallowed by the Court before: or (c) where one who has submitted to an arbitration by the rule of the Court, being afterwards personally served with a copy of the award, and required to perform it, refuses to do it: or where one refusing to pay the costs taxed by the master; for such a taxation is, in judgment of law, a taxation by the Court. Or if a defendant in a penal action obtain a rule to stay proceedings on paying a sum agreed upon between him and the plaintiff, it is an undertaking by him to pay that sum, and for the non payment of it the Court will grant an attachment. But it seems, that generally an attachment is not grantable for disobedience of any rule, unless the party have been personally served (4) Will. 3. c. 15. 1. Bar. K. B. 462. 2. Williams 450. Barnes 40, 41. 2. Barnes 55. 140. Salkeld 71. 84. 10. Modern 133. 12. Modern 234. 257. 317. 525. 533. 535. Strange 695. Rex v. Clifton, 5. Term Rep. 257.

(4) And therefore an *affidavit* to support a rule for an attachment must state that the defendant was personally served with a copy of the rule, and that the original was shewn to him at the same time, Rex v. Smithies, 3. Term Rep. 351. But if he secrete himself, the Court, on affidavit, will grant a rule *nisi* for service at the last place of abode.—N. B. One in custody upon an attachment for non-payment of costs under the 5. and 6. William and Mary, c. 11. s. 3. may be discharged under the Lords act, 32. Geo. 2. c. 28. s. 13.

with

with it; nor for disobedience of a rule, at *nisi prius*, unless it be made a rule of court; nor for disobedience of a rule made by a judge at his chamber, unless it be entered.

As to the fifth particular, *viz.* Where persons are punished in the manner above-mentioned, for abuses of the process of the Court. 1. Bar. K. B. 56. 78. 101.

Sett. 38. There are so many instances of this kind that it would be in vain to go about to enumerate them all, and therefore I shall only take notice of some of the principal of them; as,

Sett. 39. FIRST, The taking out such process without any colour of right to it; as where one sues out execution without any judgment to warrant it, &c. or where a woman brings an appeal (*a*) of the death of her husband, whom she knows to be alive. Hobart 264.
Fortesc. 267.
(a) 8. H. 417.
F. Cor. 73.

Sett. 40. SECONDLY, The making use of such process as a stale to help the jurisdiction of an inferior court; as where one arrests another by a *latitat*, in order by that means to bring him within the limits of an inferior court, and when he has got him there, drops the *latitat* and proceeds in the inferior court. Styles 239.
343.

Sett. 41. THIRDLY, Making use of such process in a vexatious manner; as where a person who has brought an action in one court, does afterwards sue the same defendant for the very same cause in another court, while the first action is still depending; in which case the defendant seems to have an election, either to move for an attachment, (*b*) or to bring an action (*c*) on the case for such a vexatious proceeding against him. (b) F. Cor.
Cum Causa,
3.
14. Hen. 7. 6, 7.
(c) Hen. 7. 6. 45.

Sett. 42. FOURTHLY, Making use of such process any other way to serve the purposes of oppression or injustice; as where (*d*) one arrests another at my suit, without my privity, in order to make some undue advantage of him, &c. (*5*) (d) Hobart
264.
Dyer 249.
Vide 8. Eliz. 2.

(5) Or where two people put in bail in feigned names. Strange 384. Or where, on a rule for a special jury, one party strikes out all the hundredors, and then, at the trial, challenges the array on that defect. Strange 593. Lord Raymond 1364. See also *vide* 2. Ld. Ray. 1001. See also Andrew 275. 8. Modern 245. Or for arresting the plaintiff while attending arbitration under a rule of court on purpose to prejudice his cause, 2. Black. 1110. *Vide* *sup.* section 37.

As to the sixth particular, *viz.* Where persons are punishable in the manner above-mentioned for forging of writs, and other deceits of the like kind, tending to impose on the Court.

Sett. 43. Nothing can be more frequent than to proceed in such manner for offences of this kind; as for altering (a) the *type* of writs; or filling (b) them up after they are sealed; or (c) for bringing groundless actions in order to intitle the parties to the privilege of the Court; or for getting (d) judgment in ejectment, by affidavit of the service of a declaration on one who was procured to personate the tenant, or for any such like practices.

(a) Dyer 241.
244.
(b) 6. Modern
310.
(c) Dyer 245.
B. Privilege
43.
(d) 6. Modern
16.
Savil 31.

Sett. 44. And it has been adjudged, that trying a *feigned issue* without the consent of the Court is a contempt for which the parties may be punished by attachment, and the proceedings stayed.

Hoskins v.
Lord Berkley,
4. Term
Rep. 4c2.

CHAPTER THE TWENTY-THIRD.

OF APPEAL.

BEFORE we examine the nature of such PROCESS as is grounded on an *Appeal*, *Indictment*, or *Information*, it may not be improper to consider the nature of each of these in particular.

OF APPEALS, there are two sorts :

1. An appeal by an innocent person.
2. An appeal by an offender confessing himself guilty ; who is commonly called an *Approver*.

SECT. 1. AN APPEAL by an innocent person, is the party's private action, prosecuting also for THE CROWN in respect of the offence against THE PUBLICK ; which he may do two ways : Finch 310,
312.
Plowden 476.

First, *By writ*.

Secondly, *By bill*.

SECT. 2. As to the *writ of appeal*, I shall only take notice, in this place, that it is an *original* issuing out of chancery, and returnable in the king's bench only : And for the form of it, I shall refer the reader to the latter part of this chapter, wherein I shall endeavour to shew for what defects it may be abated.

SECT. 3. Also I shall refer the reader to the same place for the form of a *bill of appeal*, and shall not here take any further notice of it than by observing, that it must contain greater certainty than a *writ of appeal*, and is in the lieu both of the writ and declaration.

And I shall shew before what courts, and against whom, AN APPEAL may be prosecuted.

SECT. 4. AND FIRST, there is no doubt (a) but that (a) C. Eliz. any appeal may be sued *by bill* in the king's bench against 605. 695. any person *in custodia mariscalli*, either by an actual com- Skinner 634. mitment, or by having bail filed for him in that court ; S. P. C. 64. Summary

179.
17. Affize 5. 17. Law, 3. 13.

- (a) 4. Inst. 130. but (a) not against* one who is mainprised *de die in diem*,
 1. Buft. 74. for that such an one cannot be said to be in *custodiâ*
 (b) 1. Jones *marescalli*. And it hath been resolved (b), that if the ap-
 425. pellee be arraigned and tried the same Term, there is no
 C. Car. 532. necessity to file the bill against him. Also (c) it seems clear,
 1. R. Abr. 536. that if a defendant appear in the said court on a void writ of
 (c) C. Eliz. appeal, he may be committed to THE MARSHALSEA, and then
 694, 695. declared against in *custodiâ marescalli*; but where a defend-
 (d) C. Eliz. ant appears on a writ not void, but voidable only, as for
 605, 693. the want of an addition, &c. it was once (d) holden, that
 he could not be committed, nor declared against in *custodiâ*
marescalli, but ought to be discharged. But the contrary
 (e) Pas. 3. hereto seems to be now settled in the case of *Reeves v. Trun-*
 Gen. 1. dale (e), who appearing in the court on a writ of appeal of
 Comy. Rep. death, demanded *oyer* of the writ, and pleaded in abatement
 257. the want of an addition; and thereupon the Court abated
 1. Str. 402. the writ, and suffered him to be arraigned by bill in *custodiâ*
 Like case be- *marescalli*: And surely this cannot but seem more reason-
 tween Smith ble than to suffer a prisoner under so heavy an accusation,
 and Bowen, to which he is still liable, to go at large without a trial;
 Mic. 7. Annæ. neither do I find any reason given why a prisoner appearing
 11. Mod. 216. on a voidable writ, should have a greater advantage than on
 230. 254. a void one.
 2. Ld. Ray.
 1188.
 3. Ld. Ray. 536.

Keilwood 152. *Sec. 5. SECONDLY*, It is holden, that an appeal may be commenced before *justices in eyre*, which, as I suppose, must be intended of an *appeal by bill*, for that all *writs of appeal* must be returnable in the king's bench.

2. Inst. 418. *Sec. 6. THIRDLY*, Also it seems clearly to follow, from
 420. the purport of the statute of *Westminster the second*, c. 29, that bills of appeal may be commenced and determined before justices, specially assigned, in special cases, and for certain causes, to hear and determine them.

(f) B. App. 11. *Sec. 7. FOURTHLY*, It is certain (f) that commissioners
 19. 51. 123. of gaol delivery may receive a *bill of appeal* against any pri-
 Dyer 201. soner of the gaol which they are authorised to deliver. Also
 S. P. C. 64. it is generally holden, that they may receive such a bill
 Summary against a person who has been let to bail by them, but not
 179. against one who has been let to mainprise. And it hath
 2. Hale 35. been resolved, that if part of the accomplices to the same
 felony be in the prison which such justices are to deliver,
 and the others be not in it, the justices shall receive an ap-
 peal against them all, which, after the trial of those that are
 in the prison, shall be removed into the king's bench,
 where the others shall be proceeded against. But these
 three last points, having been already more largely con-
 sidered,

sidered, chap. 6. sect. 5. I shall refer the reader to what is there said concerning them.

Seet. 8. FIFTHLY, It seems to follow, from the pur-
port of the statutes which have been generally construed
to authorise justices of assize to deliver gaols without any
special commission of gaol-delivery, that they may receive
bills of appeal in the same manner as commissioners of gaol-
delivery may. Vide sup. f.
28, 29, 32.
Dyer 99.
Co. Lit. 263.

Seet. 9. SIXTHLY, It seems to be holden in *Fitzherbert's Abridgment*, (a) that justices of peace have power to
receive appeals by virtue of 34. Edw. 3. c. 1. which
enacts, "That they shall hear and determine all manner
of felonies and trespasses in the same county, &c." But
there is much greater authority (b) for the contrary opi-
nion; and the case in the (c) *Year Book*, in the Abridgment
whereof the said opinion of *Fitzherbert* is insinuated, is
plainly mistaken, for that it makes no manner of mention
of *justices of peace*, but only of *justices of gaol-delivery*;
to which may be added, that the above-mentioned statute
of 34. Edw. 3. c. 1. which empowers justices of peace to
hear and determine felonies, &c. is express, that they shall
have power so to do at the king's suit, which must be either
taken to exclude the suit of the party, or to signify little or
nothing. (a) Corone 95.
(b) Vide
S. P. C. 65.
2. Inst. 420.
Summary 179.
3. H. 4. 19.
B. App. 18.
(c) 44. Ed. 3.
44.
See B. App.
11.

Seet. 10. SEVENTHLY, It is certain, that an appeal may
be commenced (d) by bill before the sheriff and coroner,
and removed (e) from them into the king's bench, by
certiorari, as hath been more fully shewn chapter the
ninth (1). (d) See c. 9.
f. 39, 40, 41.
2. Hale 67, 68.
(e) See c. 9.
f. 42.

(1) Where an appeal is commenced in the court below, and removed into the king's bench, the appellee is to be arraigned *de novo*, on the same bill of appeal, and it is not necessary to exhibit a new bill against him *in custodia marefballi*; and if the appellant will not appear to prosecute his appeal, the appellee may sue out a *seire facias* re-
citing the whole matter, warning him to appear at a certain day; and if he make default, the Court on demand will nonsuit him; but the appellant may appear *gratis*, and prosecute without any *seire facias*. Carthew 394. 595. Skinner 670.
Bac. Abr. 126.

Seet. 11. EIGHTHLY, It seems to be agreed, (f) that
an appeal by the course of the civil law, in nature
of a bill of appeal by the common law, may be sued be-
fore the constable and marshal for some felonies done out
of the realm: In relation whereunto it is enacted by 1. Hen.
4. c. 14. as followeth: "For many great inconveniences
and mischiefs that often have happened by many appeals
made within the realm before this time, it is ordained
" from (f) Sum. 189.
S. P. C. 65.
2. Inst. 74.
Vide inf. f. 28.

“ from henceforth, that all appeals to be made of things
 “ done within the realm, shall be tried and determined by
 “ the good laws of the realm; and that all appeals to be
 “ made of things done out of the realm, shall be tried and
 “ determined before the constable and marshal of England
 “ for the time being.”

Sec. 12. In the construction of this statute, it seems to have been agreed, (*a*) that if any of the king's subjects kill any other of his subjects in any foreign realm, the wife or heir of the deceased may have an appeal of his death, before the constable and marshal, who shall proceed according to the civil (*b*) law, and give sentence by the testimony of witnesses or combat: From whence it follows, (*c*) that no such sentence can corrupt the blood of the appellee, for that such corruption can only be caused by a judgment by course of the common law. Also (*d*) it seems to be clear, that no such appeal can be prosecuted before the marshal alone without a constable.

(*a*) S. P. C. 65.
 1. Inst. 74.
 13. H. 4. 5.
 (*b*) 4. Inst. 155.
 1. Inst. 74.
 391.
 Sup. c. 4. f. 10.
 B. Jur. 103.
 (*c*) See b. 1. c. 37. f. 8.
 and c. 4. of his book, f. 10. and 1. Inst. 391.
 1. Inst. 74. (*d*) See c. 4. f. 8. Hutton 3.

(*e*) S. P. C. 65.
 1. Inst. 74.
 B. 1. c. 31.
 f. 11.

Sec. 13. It hath been holden (*e*), that if a man die in England, of a wound given him in a foreign realm, he may be appealed, by the intent of this statute, before the constable and marshal, for that it is certain, that he cannot be tried by the common law, and it cannot be thought the meaning of the statute, in restraining the civil law in cases within the consueance of the common, to restrain it also in cases which the common law had nothing to do with, and which were properly cognisable by the civil law, and by that only; for the only end of such a construction would be to cause a failure of justice.—† But by the 2. Geo. 2. the offender may be indicted or appealed in the county where either the death or the stroke shall happen.

Sec. 14. It is farther enacted by the said statute of 1. Hen. 4. c. 14. “ That no appeals be from thenceforth
 “ made, or in any wise pursued in parliament, in any time
 “ to come.”

I. APPEALS, considered as to the matter of them, are of two kinds, *viz.* Not capital; and, Capital.

Sec. 15. OF APPEALS *not capital*, there were anciently several kinds, as appeals *de pace*, *de plagis*, and *de imprisonmentis*, as well as appeals of *mayhem*. But the former of these having been out of use, and turned to actions of trespass, for these

Fleta, l. 1. c. 41.
 Broc. l. 3 c. 25.
 4. Inst. 182.
 1. Inst. 1:6.

these many hundred years, I shall only consider the nature of an appeal of *mayhem*.

For the better understanding of an appeal of *mayhem* I shall endeavour to shew,

1. Of what *mayhems* it lies.
2. What ought to be the form of the writ, bill, and declaration.
3. What defence may be made by the appellee.
4. How the *mayhem* shall be tried, and where the trial shall be peremptory.

As to THE FIRST POINT, viz. Of what *mayhems* an appeal lies.

Sec. 16. I shall take it for granted, that notwithstanding every (a) hurt whatsoever done to a man's body, whereby he is less able in fighting, may perhaps, properly enough, in a large sense, be called a *mayhem*, and (b) will certainly subject the person who occasioned it to the payment of damages in an action of trespass by the party grieved, whether it were malicious, or happened through accident or misadventure, yet (c) an appeal of *mayhem* cannot be maintained for any such hurt, unless it were accompanied with some evil intention in the person who caused it; for surely the law, in requiring that the word "*felony*" be made use of in every such appeal (as will be more fully shewn under the next point), cannot imply less than that the fact must be attended with some odious circumstances; yet it seems clear, that if a man striking another, with such an evil intent as would subject him to an appeal of *mayhem* if the person struck at should be maimed, shall happen to miss him, and strike a third person, and maim him, he is liable (d) to an appeal of *mayhem* at his suit, whether he had any kind of ill will against him or not.

(a) See B. 1, c. 44.

(b) 2. Jones 205. Hobart 134.

(c) 13. H. 7. 14.

(d) B. App. 157. 13. H. 7. 14. See B. 1. c. 31. f. 41.

As to THE SECOND POINT, viz. What ought to be the form of the writ, bill, and declaration, I shall only take notice in this place,

Sec. 17. FIRST, That the word "*mayhemavit*" (e) is so necessary in every such writ, bill, and declaration, that it can be supplied by no other word of the like sense, nor by any circumlocution whatsoever.

(e) 1. Inst. 126.

Sec't. 18. SECONDLY, That in every such writ, bill, or declaration, the *mayhem* must (a) be laid to have been done felonically, and yet the defendant is not, at this day, subject to the loss of member from such an appeal, as anciently (b) he was; in which respect the law seems to have required the use of the word *felonically*.
 (a) 1. Inst. 127.
 B. App. 72.
 86. 143.
 (b) See B. 1. c. 44. sect. 3.
 1. Inst. 127.
 Pulton 17.

Sec't. 19. THIRDLY, (c) That it is in the election of the plaintiff to declare against him who actually gave the wound, as the principal offender, and against those who abetted him, as accessaries; or else to declare against them all as principals.
 (c) 41. Affize 16.
 40. Affize 9.
 F. Tres. 199.
 F. Cor. 11.
 228.
 S. F. C. 44.
 Contra. B. Appeal 60. 154. F. Cor. 60. 110.

Sec't. 20. FOURTHLY, That if a man bring a writ of appeal of *mayhem*, and count of battery, he abates the writ, because the writ supposes no battery, and therefore is not pursued by such a declaration as it ought to be. But for other particulars relating to the form of appeals, I shall refer the reader to the books (d) of Entries.
 (d) Coke's Ent. 50, 51.
 Rast. 45, 46.

As to THE THIRD POINT, viz. What defence may be made by the appellee.

Sec't. 21. Being able to find little or nothing particular concerning *pleas in abatement* by such an appellee, I shall refer the reader, for that matter, to what is said concerning pleas in abatement of appeals in general, in the latter part of this chapter, and only take notice in this place of the following particulars.

1. Where a recovery in another action may be pleaded in bar of an appeal of *mayhem*.

2. Where and in what manner *son assault demesne*, and other matters of the like nature, may be so pleaded.

3. Whether an arbitrament, or an accord with satisfaction, may be so pleaded.

4. What kind of release may be so pleaded.

5. Where a nonsuit in a former action.

(e) 1. Inst. 295.
 26. That (e) an appellee cannot wage his law.
 Vint 48. Edw. 3. 6. F. Ley 36.

As to the first of these particulars, *viz.* Where a recovery in another action may be pleaded in bar of an appeal of *mayhem*.

Sett. 22. It seems clear, that notwithstanding a recovery, (a) in an appeal of *mayhem*, cannot be pleaded in bar of an action of trespass for the battery with which the *mayhem* was accompanied, because (b), in such an appeal, the *mayhem* only is considered distinct from the battery, yet (c) a recovery in an action of trespass, for an assault, battery, and wounding, may be pleaded in bar of an appeal of *mayhem*, appearing by proper averments to be brought for the same trespass; for it shall be intended that the jury, in giving damages for the wounding, included the maim, and no man shall be liable to double vexation for one and the same thing; yet (d) in such a case if the appellee shall make it appear, by a special replication, that the maim hath been occasioned since the verdict in the action of trespass, by some subsequent mortification, dryness, or shrinking of the part, by reason of the wound, perhaps he may avoid such plea by such special matter; but the Court will not intend it unless it be specially shewn.

As to the second particular, *viz.* Where, and in what manner *son assault demesne*, and other matters of the like nature, may be pleaded in bar of an appeal of *mayhem*.

Sett. 23. It seems clear, that it is a good plea in bar of such appeal, that (e) the plaintiff first assaulted the defendant, and would have beaten and killed him, unless he had defended himself against him, &c. or that (f) the plaintiff first assaulted the defendant, who fled from place to place, till he was reduced to a necessity of fighting, &c. And in some books (g) it seems to be holden in general, that *son assault demesne* may be pleaded in bar of any such appeal, without any special circumstances in favour of the defendant: Yet how far a trifling assault may justify a grievous *mayhem*, as the cutting off of a leg or hand, &c. unless it happened accidentally in the scuffle, without any barbarous intention, may well deserve to be considered. However (h) it seems clear, that if the maim in the declaration be laid in *A.* and the defendant justify the same maim, by reason of an assault made upon him by the plaintiff in *B.* he needs not traverse the maiming of the plaintiff in *A.* or in any other place; for it is apparent, that the same maim could not be given but in one and the same place; and therefore being justified in any one place, it is well answered. Also it seems (i) clear, that a man cannot justify the maiming another in defence of his possessions, but only

(a) 21. Affize 82.
F. Cor. 110.
182.
4. Coke 43.
43. Affize 39.
(b) 8. Ap. 60.
(c) 4. Co. 43.
1. Leon. 318,
319.
42. Affize 3.
(d) 1. Leon. 318. 391.

(e) 2. R. Ab. 547.
Rastal 45.
(f) 2. R. Abr. 112.
25. Ed. 3. 42.
See B. 1. c.
60. sect. 23.
(g) 27. Edw. 3. 94.
41. Affize 21.
F. Cor. 142.
1. Keble 921.
1. Sid. 246.
(h) 41. Affize 21.
B. Visse 74.
B. Trav. 173.

(i) 2. R. Abr. 548.
2. Inst. 316.
in

(a) 2. Inst.
282, 283.
2. Inst. 316.

in the defence of his person. Also it is certain, (a) that a defendant cannot give in evidence on the general issue, that the plaintiff first assaulted him, but must specially plead it.

As to the third particular, *viz.* Where an arbitrament, or accord with satisfaction, may be pleaded in bar of an appeal of *mayhem*.

(b) 35. H. 6.
39. 30.
6. H. 7. 1.
F. Cor. 63.
6. Coke 44.
(c) 9. Co. 78.

Sec. 24. It clearly seems to be admitted in the pleadings (b) in some books, and is said (c) to have been adjudged in a roll not printed, that notwithstanding every such appeal must suppose the fact to have been done feloniously, yet inasmuch as at this day it subjects not the appellee to the loss of member, but only to damages, &c. as an action of trespass doth, it may be well barred either by arbitrament, or an accord with satisfaction executed.

As to the fourth particular, *viz.* What kind of release may be pleaded in bar of an appeal of *mayhem*.

(d) Lit. sect.
501.
(e) Lit. sect.
508.
(f) 1. Inst. 288.

Sec. 25. There can be no doubt but that a release of all manner of appeals, (d) or a release of all manner of actions, or a release of all manner of demands, (e) might always be pleaded in bar of such an appeal; and that a release of all manner of actions (f) personal may also be pleaded in bar of it at this day. because the appellant shall recover in it nothing but damages; but while it subjected the appellee to the loss of member, it seems questionable, whether it could be barred by a release of actions personal, because it seems to have been then esteemed an action of a higher nature, and not properly to come under the notion of a personal action.

1. Inst. 288.

As to the fifth particular, *viz.* Where a nonsuit in a former action may be pleaded in bar of an appeal of *mayhem*.

(g) 43. Affize
39.
40. Affize 1.
1. Inst. 139.
F. Cor. 214.
(h) 43. Affize
39.
B. App. 238.

Sec. 26. It seems clear, (g) that a nonsuit in any such appeal, after the plaintiff hath appeared to it, may be pleaded in bar of any other. Also (h) it seems to have been adjudged, that it may also be pleaded in bar of an action of trespass brought for the same maim, and also for the battery with which it was accompanied; yet howsoever the law may stand in relation to this matter, if such action be brought for the battery only, without mentioning the *mayhem*, I see not how it can be barred by such a nonsuit, because it is generally holden, that in an appeal of *mayhem* no

con-

consideration (a) can be had of *the battery*, but only of *the mayhem*; and if so, it seems strange, that a nonsuit in such an appeal should bar an action of a different nature, brought for a matter which the appeal had nothing to do with. However (b) it seems clear, that a nonsuit in an *action of trespass* is no bar of an *appeal of mayhem*. Also I take it for granted, that a nonsuit in an appeal of *mayhem*, before the plaintiff hath appeared to it, is not (c) a bar of any other appeal or action, because the writ, for what appears to the contrary, might be purchased by a stranger, in the name of the plaintiff.

(a) B. App. 60.
F. Cor. 110.
181.
Vide sup. sect. 22.
(b) B. App. 138.
F. Ley 36.
(c) 1. Inf. 139.

As to THE FOURTH POINT, *viz.* How the *mayhem* shall be tried, and where the trial shall be peremptory.

SECT. 27. There is no (d) doubt but that if the defendant put it in issue, whether the plaintiff were maimed or not, and pray that the part which was hurt be viewed by the Court, in order to have it adjudged on such view, whether there be any *mayhem* or not, the Court may take a view of the part, and on such view determine the matter; or if there remain a doubt upon the view, may (e) award a writ to the sheriff to return some able physicians and surgeons, for the better information of the Court. But it seems, that the Court cannot proceed to such a trial by their view, unless the defendant pray it: And in such case it seems (f) that they are not bound to try it in such manner, but may order a trial by a jury, at which it is said, (g) that they may, if they think fit, order that the jury shall have a view of the wound: And because the Court has such a discretionary power in relation to such view, it hath been resolved, (h) that the plaintiff in the appeal must appear in proper person, and not by attorney, because that would put the view out of the power of the Court. And it seems to be agreed, (i) that an adjudication made upon such view is peremptory and conclusive to each party.

(d) 28. Affize 5.
8. H. 4. 21.
2. R. Abr. 578.
(e) 28. Aff. 5.
Rastal 46.
28. Ed. 3. 94.
(f) 6 H. 7. 1.
21. H. 7. 33.
21. H. 7. 40.
41. Affize 27.
(g) 22. Aff. 82.
Vide 21. H. 7. 33.
(h) 2. Inf. 213.
(i) 6. H. 7. 1.
28. Affize 5.
21. H. 7. 33.
37. Affize 9.
26. Affize 52.

SECT. 28. It seems to be holden, that the defendant, in an *appeal of mayhem*, may in some cases *wage battle*; but I find no instance in which *BATTLE* hath been actually waged in such an appeal.

II. Of APPEALS *capital* there are two kinds:

1. Appeal of treason.
2. Appeal of felony.

AND

AND FIRST OF APPEALS of *Treason*.

(a) 3. Inst. 132. *Sett.* 29. APPEALS of *Treason*, as it is said, (a) might be
 Bract. 118, 119. sued anciently not only before the parliament, but also be-
 Fleta l. 1. c. 21. fore other courts of common law as well as before the con-
 S. P. C. 78. stable and marshal, and were determinable by battle, verdict,
 Con. or otherwise, according to the course of the several courts
 B. Appeal 46. before which they were commenced. But it is certain,
 1. Hale 349. that such appeals before the parliament are taken away by
 2. Hale 150.* 1. Hen. 4. c. 14. set forth more at large in the four-
 teenth section of this chapter. But I do not see any rea-
 son why appeals of treason, done in the realm, before
 other courts of common law, which had before jurisdiction
 thereof, should be construed to be taken away by that
 statute, which by ordaining, "that appeal of things done
 "within the realm, shall be tried and determined by the
 "good laws of the realm," cannot be intended to restrain
 any appeal determinable wholly by those laws, as all the
 appeals before the courts of common law seem always to
 have been.

However, since there has been no instance of any such
 appeal, before any court of common law, either since the
 making of the said statute, nor for many years before, the law
 relating to such appeals seems wholly obsolete at this day (2).

(2) Appeals of *Treason* in the common law courts seem to be taken away by
 5. Edw. 3. c. 9. and 25. Edw. 3. c. 4. by which none shall be put to answer except
 by indictment or presentment. 1. Hale 349.

4. Inst. 124. But as for appeals before the constable and marshal, of
 Summary 180. treasons done out of the realm, it seems clear, that the law
 seems con- in relation to them is still in force, as it always hath been ;
 trary. for the said statute of 1. Hen. 4. c. 14. by ordaining, "that
 "appeals of things done out the realm shall be tried and
 "determined before the constable and marshal," seems clear-
 ly rather to affirm than weaken their jurisdiction in relation
 to such treasons.

Rushworth's Also it hath been adjudged, that the statutes which ordain,
 Collect. Part that treasons done out of the realm shall be tried in the
 2. vol. 1. king's bench, &c. do not take away the jurisdiction of the
 from fol. 112. constable and marshal, in relation to appeals of such trea-
 to 128. sons ; as hath been more fully shewn chap. 4. section 10.
 And agreeable hereto, an appeal of treason, supposed to have
 been committed beyond sea, was actually commenced in
 the seventh year of the reign of king *Charles the first*, by
Donald Lord Rea, against *David Ramsey esq.* before the
 constable and marshal, who, for want of sufficient proof
 to clear the truth of the accusation, actually awarded, that
 A DUEL should be fought between the said appellant and ap-
 pellee, for the final determination of the matter.

SECONDLY,

SECONDLY, Of Appeals of felony there are four principal kinds.

1. An appeal of Death.
2. An appeal of Larceny.
3. An appeal of Rape.
4. An appeal of Arson.

But before I examine the nature of each of these in particular, I shall premise some things in general concerning what persons are capable of bringing them.

SECT. 30. FIRST, that (a) the infancy, old age, or other imbecility of the plaintiff, is no good objection against his bringing an appeal, though it take from the defendant the benefit of *waging battle*, and in that respect puts him in a worse condition than he would be in, if the appeal were brought by a person capable of fighting; for^a inasmuch as the defendant has proper means for his acquittal, by putting himself upon a trial by his country, and the imbecility of the plaintiff is wholly owing to the act of God, and no ways lessens the injury complained of by him, it is not reasonable he should suffer any disadvantage from it. And agreeably hereto it seems to have been settled, (b) of late times, contrary to the numerous authorities (c) in the old books, that *the parol* shall not *demur* in an appeal for the nonage of the plaintiff. Yet it is certain, (d) that an infant must prosecute such suit by a guardian; and it is said, (e) that he shall be nonsuited for the non-appearance of such guardian, upon demand, at any day whereon he is demandable, notwithstanding an allegation that he was not able to come by reason of sickness, or other such like excuse. And there (f) is a case wherein the Court refused to enlarge the day of such guardian's appearance upon a surmise of his sickness. But notwithstanding the guardian be so necessary in the prosecution of such a suit, yet if the infant come into court, and say he will relinquish it, and yet the guardian will prosecute it, the Court may, (g) in discretion, discharge such guardian, and assign another; for it is not reasonable that an infant be bound to continue a suit against his will which demands nothing but revenge, and will be chargeable to him.

Latch. 173. (f) *Noy* 88. *Latch.* 173. (g) 1. R. Abr. 288. *Style* 456. *Sal-*
keld 176, 177.

(a) *Moor* 481.
Summary 183.
Keilwood 120.
S. P. C. 60.
See the books
under cited.
Con. 45. *Ed.*
3. 25.
41. *Affize* 14.
(b) 27. *H.* 8.
11.
Keilwood 120.
S. P. C. 60.
Summary
183.
Smith and
Bowen,
M. 7. *Annæ.*
2. *Inst.* 320.
(c) 32. *Aff.* 8.
Dyer 137.
11. *H.* 4. 94.
13. *Affize* 10.
17. *Ed.* 4. 2.
B. App. 116.
F. *Age* 57.
83.
21. *Affize* 4.
27. *Ed.* 3. 83.
21. *Ed.* 3. 23.
(d) 27. *H.* 8.
11.
(e) *Noy* 88.

(a) Co. Lit. 25. *Sect. 31.* SECONDLY, (a) that a woman may sue any
 2. Inst. 68. other appeal except that of the death of an ancestor; for
 F. Corone 357. the statute of MAGNA CHARTA, 34, which ordains, "that
 S. P. C. 60. "no man shall be imprisoned on the appeal of a woman,
 Summary 184. "for the death of any one but her own husband," restrains
 not any other appeal whatsoever.

(b) Summary *Sect. 32.* THIRDLY, That an idiot, (b) or person born
 183. deaf and dumb, or one attainted (c) of treason or felony, or
 S. P. C. 60. 98. but out-lawed (d) in a personal action (so long as such at-
 (c) 11. Aff. 27. tainder or outlawry continues in force) cannot bring any ap-
 (d) 17. Affize peal whatsoever.
 26. B. App. 118. 146. F. Utlag. 47.

And now I am more particularly to consider the nature of an *appeal of death* in particular.

For the better understanding whereof, I shall examine the following points.

1. Within what time it must be brought.
2. In what county.
3. By whom.

As to THE FIRST POINT, *viz.* Within what time an appeal of death must be brought.

Sect. 33. It is enacted by the *statute of Gloucester*, chap. 9.
 (e) S. P. C. 62. "that an appeal," (e) which from the purport of the whole
 Infra sect. 48. statute hath been construed to be meant only of an appeal
 of death, "shall stand in effect, and shall not be abated for
 "default of fresh suit, if the party shall sue within the
 (f) B. App. 37. "year and the day (f) after the deed done." And it hath
 22. Ed. 4. 39. been holden, (g) that the computation of such year and
 (g) S. P. C. 63. day is to be made from the time of the wound which occa-
 sioned the death, and not from the time of the death; and
 this opinion seems somewhat to be favoured by the letter of
 the statute, which is, "that the party shall sue within the
 "year and day after the deed done," but no deed is done at
 the time of the death, but at the time of the wound: yet
 the contrary opinion is settled (b) to be law, and is cer-
 tainly more agreeable to the intent of the statute, the plain
 import whereof seems to be, that the appellant shall not be
 adjudged to have made default of fresh suit, unless he have
 been negligent a year and a day; but negligent he could not
 be as to the bringing an appeal before the party was actually
 dead, because till then no appeal lay. And agreeably hereto

it seems also to be settled, (a) that if a person become accessary after the death, by receiving the offender, an appeal lies against him at any time within the year and day after such receipt, because until then the appellant could not possibly be guilty of any negligence as to the bringing of an appeal against the receiver. Also if an appeal had been abated by the demise of the king, before 1. Edw. 6. c. 7. (by which this mischief is provided against) it seems (b) clear, that the appellant might have sued a *re-attachment* against the appellee, within the year and day after such demise, for that he was in no default, and otherwise would have been without remedy.

(a) 26. Aff.
25.
3. Inst. 53.
S. P. C. 63.
2. Inst. 320.

(b) 2. H. 7. 10.
B. App. 81.
10. Ed. 4. 13.
F. Re-attach.
7. Co. 30.

SECT. 34. It seems, that the year and day, in any of the cases above-mentioned, are to be computed from the beginning of the day on which the death, or receipt, &c. happened, and not from the precise minute, or hour; because regularly the law makes no fraction of a day; and therefore (c) if the party die at any time the first day of *January*, the year shall end the first day of *January* following.

(c) Vide
5. Co. 1.
Co. Lit. 130.
255.
Con.
3. Inst. 53.

As to THE SECOND POINT, *viz.* In what county an appeal of death must be brought.

SECT. 35. I shall take it for granted, that it is a *local action*, (d) and consequently cannot be brought in a foreign county. But if a person happen to die in one county of a wound received in another, it is said, (e) that the appellant had, by the common law, his election to bring his appeal in either county, and that, in every such case, the trial ought (f) to be at THE BAR, and by a jury returned (g) from the body of each of those counties. But since the making of 2. and 3. Edw. 6. c. 24. by which it is enacted, "that in such cases, the party to whom appeal of murder shall be given by the law, may commence, take, and sue appeal of murder in the same county where the person feloniously stricken, or poisoned, shall die, &c." I take it for granted, that such an appeal in the county wherein the party died, may be tried by a jury of such county without the joinder of any other.

(d) 18. Ed. 3.
32.
S. P. C. 63.
F. Forfeit. 14.
Dyer 18; &c.
(e) 2. Hale 163.
3. H. 7. 12.
4. H. 7. 18.
F. Cor. 50. 60.
But the preamble of 2. & 3. Edw. 6. 24. seems contrary.
(f) Dyer 46.
(g) 3. H. 7. 12.
Finch 410.
Dyer 46.
Vide 2. G. 1.
2. c. 24.

I shall not in this place examine in what county accessaries to murder are to be appealed or tried, but shall refer the consideration thereof to the chapter concerning the arraignment of the PRINCIPAL AND ACCESSARY.

As to THE THIRD POINT, viz. By whom an appeal of death is to be brought; I shall endeavour to shew,

1. Where it may be brought by a wife;

2. Where it may be brought by an heir.

As to AN APPEAL of Death by a wife, the following particulars seem most observable.

Vide infra

106. 39. 200.

(a) 2. Inst. 68.

28. Ed. 3. 91.

50. Ed. 3. 15.

27. Affize 3.

11. H. 4. 14.

S. P. C. 59.

Summary 181.

1. Inst. 33.

(b) Brañt. 1. 3.

c. 29.

Flet. l. 1. c. 35.

S. P. C. 58.

(c) 2. Inst. 68.

217.

(d) S. P. C. 59.

Sec. 36. FIRST, She must be able to prove, not only that she was wholly innocent herself of the death complained of, but also that she was the lawful wife of the deceased at the time of his death; for it seems to be clearly settled, (a) that "*ne unques accouplein loial matrimonie*" is a good plea in such an appeal, and triable by the bishop's certificate, who, if the marriage were unlawful, by reason of a precontract or consanguinity, or otherwise, ought to certify against the appellant. Also it is laid down as a rule in the old books, (b) that a wife may have an appeal of the death of her husband *inter brachia sua interfecti et non aliter*. By which words "*inter brachia sua*," according to Sir Edward Coke, (c) it is to be understood, that the deceased had the wife lawfully in possession at his death; and if this be the meaning of them, thus much at least seems to follow, that if the husband were divorced from the wife at his death, though by a voidable sentence, she cannot maintain an appeal. Yet it is generally holden, that a wife who hath eloped from her husband may have an appeal of his death, as shall be more fully shewn in the next section. And Staundford (d) seems to understand the import of the expression above-mentioned to be this, that the wife ought to have had the deceased in her view, and to have been present at his death, which is most certainly not necessary at this day. But finding little more said concerning this matter in any other modern book, I shall leave the farther consideration thereof to others.

(e) 27. Affize

41.

35. H. 6. 57.

B. Appeal 131.

F. Corone 21.

Co. Lit. 33. b.

7. Co. Calvin's

Case, 13. b.

S. P. C. 59.

(f) B. App.

148.

(g) B. App. 17.

1. Inst. 33.

S. P. C. 59.

Con.

2. Inst. 317.

Sec. 37. SECONDLY, In some cases a woman may have an appeal of the death of her husband, where she cannot claim *dower* of his lands; as where the husband was attainted (e) of high treason at the time of his death; for after the attainder he was still her husband as much as before, and (f) it is the loss of her husband which is the cause of the appeal. Also where a woman elopes from her husband, it is said, that she may have an appeal (g) of his death, though not a *writ of dower*; for by the common law she might have had both; and the *statute of Westminster the second*, c. 34. which takes from her the latter, leaves the other as before.

Sec.

Seft. 38. **THIRDLY**, If such appellant take another husband either before, or pending the appeal, she puts (a) an end to it for ever; for being given her only from a regard to her widowhood, it cannot but cease when that determines, and being once barred, it is barred for ever. And on this ground it seems also to be certain, (b) that if she marry after judgment in appeal, she cannot pray execution. However it seems clear, that in such a case the appellee shall not (c) be discharged without the king's pardon: But I do not find it settled (d) what ought to be done with the appellee in such a case. But thus much seems to be certain, that the king cannot proceed against him by way of indictment, because he is attainted already; and therefore it may probably be argued, that the Court may award execution against him, either *ex officio*, or at least at the demand of the king; for otherwise he would save his life by reason of the attainder by which he is adjudged to lose it.

S. P. C. 166. (d) 2. Leon. 83. Vide 21. Ed. 4. 72, 73.

As to the **APPEAL of Death by an heir**, the following particulars seem most remarkable.

Seft. 39. **FIRST**, If the deceased had a wife at the time of his death, and such wife were wholly innocent of it, she only, (e) and not the heir, hath a right to the appeal; and whether she bring one, or wholly neglect it, and though she die or marry within the year and day, the heir cannot bring an appeal; and the reason hereof, according to *Keilway*, (f) is this, that the appeal being once out of the blood, shall not return to it again: Yet (g) if the wife herself had a share in the guilt, the heir may have an appeal against her. But if the petit treason be pardoned by the parliament, it seems, that (h) the heir can bring no appeal; for he cannot bring it for the murder only, because the petit treason includes in it murder and more, and being the greater offence drowns the less, and therefore the pardon of it seems to pardon the murder also.

Seft. 40. **SECONDLY**, Every such appellant must be *heir general* (i) to the deceased, by the common course of the law, unless the (k) heir general had himself a share in the guilt, in which case the *next heir* shall have an appeal against him. But a father cannot (l) have an appeal of the death of his son, because he cannot be his heir. Neither can (m) can any one bring an appeal of the death of a person attainted of treason or felony, except his wife, because he can have no heir. Neither shall a *special heir*, (n) by the custom of *borough English*, or otherwise, have an appeal of the death of his ancestor, because he is not his next general

(a) Sum. 181.
S. P. C. 59.
2. Inst. 69.
20. H. 6. 43.
B. App. 148.
(b) 11. H. 4.
48.
B. App. 109.
112. Con. 21.
E. 4. 73.
See also the
books above
cited.
(c) B. App.
27.
3. Inst. 209.
2. H. 7. 10.
8. H. 4. 22.
F. Sc. Fac. 41.
38. H. 6. 13.
9. H. 7. 5.
Ed. 4. 72, 73.
(e) Keilw. 120.
Summary 182.
S. P. C. 59.
20. 6. 43.
(f) Keilw.
120.
(g) C. Car.
531, 532.
1. Jones 425.
18. Edw. 4. 1.
F. Cor. 459.
Sum. 181, 182.
S. P. C. 59.
(h) Dyer 50.
1. Leon. 326.
(i) 27. Ed. 3.
83.
F. Cor. 322.
Summary 182.
S. P. C. 59.
27. Affize 25.
(j) Sum. 182.
F. Cor. 459.
S. P. C. 60.
(k) F. Cor. 41.
(l) B. App.
116, 131.
2. Affize 3.
(m) S. P. C. 59.
Summary 182.

(a) S.P.C. 60.
1. Inst. 8. 13.
20. H. 6. 43.
F. Cor. 235.
But F. Cor.
322. seems
contrary.

neral heir; and yet he is inheritable to such of his lands to which the custom extends, &c. And for the like reason, if the deceased, at the time of his death, had two sons, the elder whereof is attainted of treason or felony, neither (a) of them can have an appeal; not the elder, because of the attainder; not the younger, because he cannot be heir to his father while he has an elder brother; who though he be looked upon as dead in law to some purposes, is yet in truth alive, and capable of forfeiting all the privileges belonging to the heir, though not of taking benefit from any of them. But notwithstanding a younger son cannot bring an appeal of the death of the father, while there is an elder son of the same father living, yet if the eldest son be by one venter, and the middle and younger son by another, and the middle son be killed, the youngest only shall have an appeal of his death, because he only is his heir, as being of the whole blood with him; and therefore, (b) it is no good plea to an appeal for the death of a brother, that the appellant has *J. S.* an elder brother living, without shewing, that *J. S.* was of the whole blood to the deceased.

(b) 7. E. 4. 15.
F. Cor. 28.
B. App. 94.
S. P. C. 60.

(c) 11. H. 4.
11. b. 12.
9. H. 7. 5.
16. H. 7. 15.
S. P. C. 59.
Summary 182.
B. App. 30. 88.
104. 141. 144.
(d) 16. H. 7. 15.
B. App. 156.
11. H. 4. 11.
(e) S. P. C. 59.
Dyer 69.
(f) 20. H. 6. 43.
11. H. 4. 12.
Summary 182.
B. App. 30. 88.
104. 141. 144.
(g) Sup. f. 39.
(h) Sum. 182.
13. H. 4. 6.
11. H. 4. 11.
(i) S. P. C. 59.
(k) 18. H. 6. 13.
9. H. 7. 5. 6.
16. H. 7. 15.
17. H. 4. 11. 12.
B. App. 141.
144. 156.
(l) 2. Leon.
83. seems
contrary.

SECT. 41. THIRDLY, If an appeal be once commenced by an heir, who dies hanging the suit, it seems to be agreed, by (c) almost all the books, that no other heir can afterwards proceed in such appeal, or commence a new one, for that this is a personal action, given to the heir in respect to his immediate relation to the person killed, at the time of his death, and, like other personal actions, shall die with the person. But some (d) have holden, that if the first heir die within the year and day, without commencing an appeal, the next heir may bring one. But this is made a doubt by others, (e) and the generality (f) of the books seem to favour the contrary opinion, as being more agreeable to the reason of the case above-mentioned, and the general tenor of the law in relation to appeals, which, in no case that I know of, will suffer the right of bringing one to be transferred from one to another; and therefore, as in case (g) where the deceased hath a wife at the time of his death, who dies within the year and day, the heir hath no right to an appeal; so if he have an heir at his death, in whom the right of the appeal is vested, and such heir die within the year and day, it seems, that no other heir shall have an appeal. Yet it is holden, (h) by *Sir Matthew Hale*, and some others, that if the first heir get judgment in an appeal of death, and die, his heir may sue execution. But this is doubted of by *Sir William Staundford* (i), and seems contrary to many (k) of the old books, and not easily reconcilable with the reason of the cases abovementioned. But whether in this case the Court may (l) not award execution either *ex officio*,

facio, or at the demand of the king, may deserve to be considered, for the reasons given *Sett.* 38. Also if a person who is killed have no wife at the time of his death, and no issue but daughters, and all those daughters die within the year and day, it may reasonably be argued, that the heir male may have an appeal, because the right of bringing one never vested in any other before. But finding this case in none of THE BOOKS, I shall leave it to be more fully considered by others.

Sett. 42. **FOURTHLY**, Every such appellant must not only be *heir general* to the deceased, but also *heir male*; and this depends upon MAGNA CHARTA, c. 35. by which it is enacted, "that no one shall be taken or imprisoned ~~on~~ the appeal of a woman for the death of any one but her own husband." And the Judges are so far bound to take notice of this statute, that if a woman bring an appeal of the death of her father, or of any other but her husband, they ought, (a) *ex officio*, to abate the writ, though the defendant take no exception to it. But it is said, (b) that by the common law an *heir female* might have brought an appeal of the death of her ancestor, as well as an *heir male*. And it seems (c) to be the better opinion at this day, that the *heir male* of the deceased, who derives his blood through a *female*, may have an appeal, as the uncle being heir on the part of the mother, or the grandson by a daughter, &c. and yet the mother in the first case, and the daughter in the second, could have had no appeal; for inasmuch as by the common law, such mother and daughter had not only a right to bring such appeal, but also to have such right derived through them to others, it seems hard to construe the statute by depriving them of the former to take from them the other also; especially considering, that an *heir male* who derives his blood through females, seems no way less worthy to bring an appeal, than if he had derived it through males; and all statutes whatsoever which are made in abridgment of any right of the subject, ought to be strictly construed.

Sett. 43. **FIFTHLY**, in every such appeal, by one, as heir to the deceased, it must specially (d) appear by the writ, or at least by the count, in what manner he is so.

(a) F. Off. Court 7.
10. Edw. 4. 7.
(b) 2. Inst. 68.
1. Inst. 25.
(c) Sum. 183.
2. Inst. 68.
F. Cor. 385.
the contrary adjudged by all the Judges in the Exchequer-Chamber, but one.
20. H. 6. 43.
Qu. 17. Ed. 4.
1.
1. Inst. 25.
S. P. C. 58.
B. App. 104.

(d) 21. E. 3. 23.
45. Ed. 3. 25.
27. Affize 25.
S. P. C. 81.

Summary 187. 1. Bull. 71. 75.

AND now I am come to AN APPEAL of *Larceny*; for the better understanding whereof I shall consider,

1. By whom an appeal of Larceny may be brought.
2. Against whom it may be brought.
3. In what county it may be brought.
4. Within what time it may be brought.
5. In what case there shall be restitution of the goods stolen.

As to the FIRST POINT, *viz.* By whom AN APPEAL of *Larceny* may be brought; the following particulars seem most remarkable.

SECT. 44. FIRST, There is no necessity that the appellant have the *absolute property* of the goods stolen; for it seems agreed, that a carrier, or even a servant, (*a*) to whom goods are delivered to be carried to a certain place, or church-wardens having (*b*) possession of the goods of a church, or in general, any person whatsoever, (*c*) who is so far intrusted with the goods of another as in judgment of law to have the *possession*, and not the *bare charge* of them, may have an appeal of larceny against any one who shall steal them, for that they have a special kind of property in them against all strangers: And it seems that they may either bring a general (*d*) appeal as for their own goods, or a special (*e*) one for the goods of *J. S.* in their custody. Also it is said, that a person who hath been robbed of his goods, still continues to have so far the possession as well as the property of them, that he may bring an appeal of larceny against any one who shall steal them from the robber, as shall be more fully shewn in the next section. But it seems (*f*) clear, that no one can maintain such an appeal who has the *bare charge* of goods without a *possession*, as a butler or cook, who in my own house have the charge of my goods, for that in such a case the whole possession, as well as the absolute property, in the judgment of law always continues in me. Also it is certain, that a *villein* cannot (*g*) have an appeal of larceny against his lord, for any of his goods taken by the lord, because (*h*) the lord by seizing them makes them his own; but it is agreed (*i*) that a *villein* may have an appeal of death or an appeal of rape against his lord. Also it seems clear at this (*k*) day, that any tenant who is not a *villein*, may have an appeal of larceny against his lord.

(*a*) F. Cor. 100.
 Latch. 127.
 S. P. C. 60.
 (*b*) 11. H. 4. 12.
 12. H. 7. 27, 28, 29.
 37. H. 6. 30, 31.
 (*c*) 2. Ed. 4. 15.
 2. Ric. 2.
 3. H. 7. 12.
 5. H. 7. 18.
 21. H. 7. 14.
 Brañt. l. 3. c. 16.
 See b. 1. c. 33. f. 3.
 S. P. C. 60.
 (*d*) Keilw. 70.
 (*e*) Brañt. l. 3. c. 26.
 F. Cor. 100.
 11. H. 4. 12.
 B. G. d' Eglish 6.
 B. Cor. 142.
 B. App. 91.
 (*f*) 3. Inst. 108.
 See b. 1. c. 33. f. 6.
 (*g*) Sum. 184.
 S. P. C. 60.
 F. Cor. 17.
 B. Cor. 216.
 B. App. 34.
 (*h*) Lit. f. 177.
 (*i*) Lit. f. 189, 190 Sum. 184. (*k*) S. P. C. 62.

SECT. 45. SECONDLY, There is no necessity that the wrong for which such an appeal is brought, be immediately done to the person of the appellant; for if a servant be robbed of the master's goods in his custody, the master (*l*) may bring the appeal as well as the servant; and in such case he who first commences it shall prevent (*m*) the other. Also if one be robbed of goods wherein another is jointly interested with him, and die, the survivor (*n*) may bring an appeal.

(*l*) Sum. 184.
 (*m*) Latch. 127.
 (*n*) Sum. 184.
 S. P. C. 61.
 F. Corone 392.

peal. Also if I be robbed by *A.* who afterwards is robbed of the same goods by *B.* it is said, (*a*) that I may have an appeal of larceny against *B.* because *A.* claiming no property, but taking the goods merely as a felon, had, in judgment of law, neither any *property* nor *possession* in them, but the same wholly continued in me. But if the goods had been taken from me by a trespasser, under the pretence of some title, and such trespasser had been robbed of them, it seems that he could have no appeal for them. Neither can an executor (*b*) bring an appeal for a larceny from the testator, because such larceny, at the time when it was committed, was no injury to the executor, but to the testator only; and therefore the appeal for it being a mere personal action, and wholly vested in the testator, there is no doubt but that it dies with him, as all other actions for mere torts do.

(*a*) Sum. 184.
S. P. C. 61.
F. Cor. 39. 79.
13. Edw. 4. 3.
Keilw. 160.
B. Appeal 100.
4. H. 7. 5.
See B. 1. c. 33.
f. 9.
(*b*) Sum. 184.
S. P. C. 60.

See the Case of
Hambley v.
Trott, Cowp.
371.

As to THE SECOND POINT, viz. Against whom an appeal of larceny may be brought.

Sett. 46. Having incidentally shewn what is most considerable relating to this point under the former, I shall only take notice in this place, that this, or other appeal lies against an infant, (*c*) as well as against a person of full age; and against a *feme covert*, (*d*) in the same manner as if she were sole, without taking notice of the husband.

(*c*) S. P. C. 62.
a.
(*d*) B. Cor. 50.
15. Edw. 4. 1.
S. P. C. 62.
Vide F. Gor.
17.

As to THE THIRD POINT, viz. In what county such appeal is to be brought.

Sett. 47. There is no doubt, but that, like all other appeals, it is a local action, and must be brought in the county where the felony complained of was done. Yet if one rob me in the county of *A.* and afterwards carry my goods into the county of *B.* I have my election (*f*) either to bring an appeal of robbery in the county of *A.* or an appeal of larceny in the county of *B.* because the possession as well as property of the goods continued in me, in judgment of law, after the robbery; and therefore, in what place soever the robber keeps them from me, he feloniously injures me in the possession as well as property of them, and consequently may as properly enough be said to steal them from me. Yet he shall be appealed for the robbery in the first county only, (*g*) for there only he was guilty of taking from the person, without which there can be no robbery. Also (*h*) if one take me from the county of *A.* into the county of *B.* and there rob me, he shall be appealed for the robbery in the county of *B.* only, for he was guilty only of a trespass in the county of *B.* But (*i*) if one bring my goods into the county of *B.* by reason of a menace in the county of *A.* it may be questioned which is the proper county for the bringing of the appeal.

(*e*) Sup. f. 35.
11. H. 4. 93.
F. Cor. 437.
B. App. 35.
Dyer 38, 39,
40.
(*f*) 7. H. 4. 43.
Dyer 39, 40.
4. H. 7. 5, 6.
S. P. C. 63.
26. Affize 32.
7. Coke 2.
F. Cor. 62. 79.
F. Affize 446.
B. App. 35.
B. 1. c. 33. f. 9.
(*g*) Sum. 184.
7. Co. 2. Con.
Keilw. 160.
(*h*) S. P. C. 63.
Inf. f. 71.

(*i*) S. P. C. 63.

As

As to THE FOURTH POINT, viz. Within what time an appeal of larceny is to be brought.

Sec. 48. It seems to be agreed (a) at this day, that it may be sued at any time, as well after as within the year and day, if the plaintiff have made *fresh suit*, for that the *statute of Glocester*, c. 9. which requires, "that an appeal be brought within the year and day," hath been construed (b) to intend no other appeal but that of death; and the common law seems to have limited no certain time for the bringing of an appeal, but to have suffered it to be brought at any time by one who had made *fresh suit*; the nature whereof shall be more fully considered in the fiftieth section. But it seems, that one who has been guilty of a gross neglect in pursuing the offender, may be barred of such an appeal, as well within the year and day as after, for that the common law seems (c), in all appeals, to have required, that the appellant should have made *fresh suit*; and the said *statute of Glocester*, which takes away the necessity of it in appeals of death brought within the year and day, extends not to other appeals.

(a) Sum. 185.
S.P.C. 62, 165.
B. App. 37. 62.
7. H. 4. 44.
Con.
22. Affize 97.
(b) Sup. f. 33.

(c) 2. Inst.
319.

As to THE FIFTH POINT, viz. In what cases there shall be a restitution of the goods stolen.

Sec. 49. I shall premise, that until (d) such goods are seized to the use of the king, or of some other person claiming them under THE CROWN as being waifs, or the goods of a felon, &c. the rightful owner, without any fresh suit or appeal, may seize them wherever he finds them; but they shall not be restored to them after such seizure by others, without bringing his appeal, &c.

(d) 21. Ed. 4.
16. 7.
F. Estry 2.
Avowry 151.
S. P. C. 186.
5. Co. 109.
1. Hale 541.

And for the better understanding in what cases a restitution of the goods so seized shall be awarded on such an appeal, I shall examine the following particulars.

1. Whether it necessarily require a fresh suit.
2. What shall be esteemed a fresh suit.
3. By whom, and in what manner, such fresh suit shall be inquired and adjudged.
4. How far the appeal must be prosecuted,
5. Whether the appellant's title to such restitution shall be preferred to any subsequent title claimed in the goods.

6. Whether

6. Whether there shall be such a restitution on any other prosecution besides that of appeal.

7. Whether there shall be a restitution to any goods not mentioned in the appeal.

As to THE FIRST PARTICULAR, viz. Whether such restitution necessarily require a fresh suit.

SECT. 50. It fully appears to do so by almost all the books (a) relating to this matter, that it seems needless to cite authorities to prove it.

(a) See the authorities to the three next

As to THE SECOND PARTICULAR, viz. What shall be esteemed a fresh suit.

SECT. 51. It seems to have been anciently holden, (b) that to make a *fresh suit*, the party ought to have raised a HUE AND CRY with all convenient speed, and also to have taken the offender. But at this day it seems to be settled, (c) that if the party have been guilty of no gross neglect, but have used all reasonable care and diligence in inquiring after, pursuing, and apprehending the felon, he ought to be allowed to have made sufficient *fresh suit*, whether any HUE AND CRY were levied or not, and whether such offender were taken by means of such pursuit, or without any assistance from it.

(b) F. Cor. 319. 379. 392.
1. Hale 540.
S. P. C. 62.
165.
2. Rich. 3. 13. a.
(c) B. F. Suit 1. 6.
7. H. 4. 44.
S. P. C. 62. 165.
Qu. Ret. 64, 65,

As to THE THIRD PARTICULAR, viz. By whom, and in what manner, such fresh suit shall be inquired and adjudged;

SECT. 52. It seems, (d) that it is usual and proper to make such inquiry by the same jury that tries the principal matter; and it is certain, that upon the finding of the fresh suit by such jury, the Court may award a restitution: And in such cases wherein the appellee is condemned without any trial, as where he is convicted by his own confession, or outlawed, or stands mute, &c. it seems, that the Court may make such inquiry, by any (e) inquest of office, returned for such purpose, and on their finding the fresh suit award a restitution: But in either case such inquest is but an inquest (f) of office, and perhaps is not absolutely necessary, but required chiefly for the satisfaction of the conscience of the Judges, in a matter which, if they think fit, they may, by the purport of some authorities, (g) examine themselves, as they generally may (according to some (h) opinions) any

(d) 4. Edw. 4. 11.
S. P. C. 166,
(e) 8. H. 4. 1.
7. H. 4. 31.
2. Rich. 3. 13.
10. H. 4. 5.
Cont.
S. P. C. 166.
(f) S. P. C. 166,
and see the books cited to the other points of this

section, and Rastal 52, 53. (g) Vide F. Cor. 379. 392. (h) 14. H. 4. 9. 3. H. 6. 29. 8. H. 6. 5. Yel. 152. 1. Brownlow 214. 1. Sid. 442. Contra, Latch. 213. 3. Leonard 180. 213.

matters

matters whatsoever inquirable by an inquest of office, especially (a) if the parties interested in the thing in question be willing that they should do so: And agreeably hereto it is holden, in the best authors, (b) that the judging of fresh suit lies in the discretion of the Court; and there is a case (c) wherein a writ of restitution of the goods stolen was actually awarded, without making any inquiry of the fresh suit; but in the book wherein this case is reported, it is made a *quære*, whether such inquiry ought not to be made at the return of such writ.

AS TO THE FOURTH PARTICULAR, *viz.* How far the appeal must be prosecuted in order to intitle the appellant to a restitution.

Sec. 53. It seems, that anciently the appellant could (d) no case be intitled to a restitution, unless (d) the appellant were attainted at his suit; and therefore if several appeals were commenced against the same person by several plaintiffs, and the appellee were attainted at the suit of one of them, no (e) other could have a restitution, because the appellee (f) being once attainted, could not be afterwards attainted again: But (g) it seems to be settled at this day, that there is no such necessity that the appellee be attainted at the suit of the appellant; and therefore, in the case above-mentioned, after such attainder at the suit of one appellant, it shall be inquired by an inquest of office, whether the appellee were guilty of the facts complained of in the other appeals, and made fresh suit, &c. and upon such matter found by such inquest, a restitution shall be awarded, &c. Also (b) if an appellee die in prison, it seems that the like inquiry shall be made by inquest of office, and thereupon a restitution awarded, &c. And (i) if an appellee be outlawed, or have the benefit of his clergy before conviction, or stand mute, or challenge peremptorily above twenty jurors, or break from prison, perhaps a restitution shall be awarded upon such an inquest's finding the fresh suit, without any farther inquiry whether the appellee were guilty or not; because by refusing to take his trial, he tacitly seems to admit himself guilty. Also if one bring an appeal against two, whereof one is attainted, and the other acquitted; yet (k) it seems he shall have a restitution. But (l) if both the appellees had been acquitted, it seems, that the appellant should never have his goods again, though it were expressly found that they were his goods, but he (k) shall forfeit them to the king for his false appeal. But

(a) C. Jac. 415.
2. Saund. 106.
107.
(b) Sum. 185.
S. P. C. 62.
(c) 21. E. 4. 16.
F. Corone 42.
B. F. Suit 4.
Vide S. P. C.
166.
2. Leon. 108.

(d) 44. Edw.
3. 44.
F. Cor. 95.
162. 318, 319.
Avowry 151.
S. P. C. 165,
166.
(e) F. Cor. 95.
(f) Vid. infra
in the chap-
ter concern-
ing judgment.
Contra,
4. E. 4. 11.
(g) S. P. C.
166.
7. H. 4. 31.
F. Cor. 81.
194. 379, 380.
(b) F. Cor.
379.
Forfeit 15.
S. P. C. 166.
(i) 1. Hale
540.
21. Ed. 4. 16.
10. H. 4. 5.
40. Affize 39.
2. R. 3. 13.
8. H. 4. 1.
26. Affize 32.
F. Cor. 42.
71. 194. 217.
379. 466.
S. P. C. 166.
2. Leon. 108.
(k) S. P. C.
166.
(l) F. Cor. 367. 5. Coke 110.

quare if this ought not to be understood of such goods only (a) as were before seized to the king's use, as having been waived, &c. (a) Vide sup. f. 48.

5. Coke 110.
S. P. C. 186. contra. 3. Inst. 227.

As to THE FIFTH PARTICULAR, *viz.* Whether the appellant's title to such restitution shall be preferred to any subsequent title ~~acquired~~ in the goods.

SECT. 54. It seems clear, that the appellant's title to such restitution shall not (b) be barred by any seizure of such goods, as being waifs, or estrays, or the goods of felons, &c. (b) S. P. C. not (c) even by a sale of them *bonâ fide* made in market overt, &c. 5. Coke 109.
21. Ed. 4. 16.
Kely. 35. 47.

See the books cited sect. 49. Qu. Hct. 64, 65. F. Avowry 151. Cor. 71. 318, 319. App. 24. (c) Keyling 34. 47. Qu. Moor 360. Poph. 84. 1. And. 344. 1. Hale 543, 544.

And by the like reason it is certain, that the prosecutor of an indictment, since the statute of 21. Hen. 8. c. 11. set forth more at large in the next section, shall not be barred of his restitution by any such seizure, or sale in market overt, &c. (1)

(1) For market overt, see 4. Comm. 449. 2. Inst. 713. Mirror c. i. f. 3. Cro. Jac. 68. 1. Inst. 131. 5. Rep. 83. 12. Modern 521. and by 1. Jac. 1. c. 21. the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property.—But respecting pawnbrokers, vide 30. Geo. 2. c. 24. and 24. Geo. 3. c. 42. and the Case of Parker *v.* Patrick, 5. Term Rep. 175.

As to THE SIXTH PARTICULAR, *viz.* Whether there shall be a restitution of the goods stolen, upon any other prosecution besides that of appeal.

SECT. 55. It seems to be clearly agreed, (d) that by the common law it could not be had upon any other prosecution whatsoever: But to remedy this inconvenience, it is enacted by 21. Hen. 8. c. 11. "That if any felon or felons do rob, or take away any money, goods, or chattels, from any of the king's subjects, from their persons or otherwife, within this realm, and thereof the said felon or felons be indicted, and after arraigned of the said felony, and found guilty thereof, or otherwise attainted by reason of evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other by their procurement; that then the party so robbed, or owner, shall be restored to his said money, goods and chattels; and that as well the justices of gaol-delivery, as other justices, afore whom any such felon or felons shall be found guilty,

(d) 4. H. 7. 5.
F. Cor. 62. 460.
S. P. C. 66.
165. 167.
Summary 212.
Litch. 144.
1. Hale 542.

“ guilty, or otherwise attainted, by reason of evidence given
 “ by the party so robbed, or owner, or by any other by
 “ their procurement, have power by the said act to award,
 “ from time to time, writs of restitution (2) for the said
 “ money, goods, and chattels, in like manner as though
 “ any such felon or felons were attainted at the suit of the
 “ party in appeal.”

(2) There has been no writ of restitution sued out these 200 years.—If the goods are produced at the trial, the Court will order them to be restored to the owner; and if not restored, the owner may after prosecution recover them from the person who converts them by an action of trover. *Loft: 88. Vide Harris v. Shaw, B. R. H. 349.*

(2) S. P. C. *Sett. 56. Sir William Staundford;* (a) in his construction of this statute, seems to incline to an opinion, that the party may have a restitution by virtue of it, without making a fresh suit; and this seems to be agreeable to practice, and the purport of the first part of the statute, which seems to require no more in order to intitle the party to a restitution, than that the indicted be found guilty (3) or otherwise attainted by his evidence &c. Yet if it shall plainly appear to the Court, that the party hath been guilty of gross neglect in prosecuting the offender, it may reasonably be argued, that he is not intitled to a restitution; for the latter part of the statute, by ordaining that writs of restitution shall be awarded as though the felon had been attainted in an appeal, seems to imply, that it is a sufficient favour, within the intention of the makers of the statute, to the prosecutor of an indictment, to give him a like remedy for a restitution of his goods, as the common law gave to the plaintiff in an appeal.

(3) In the particular case of horse-stealing, it is enacted by 31. Eliz. c. 12. that where horses are stolen and sold in open market, and the owner claims them again within six months, and pays the buyer as much as they cost him, he shall have them again, *without prosecution.*

(b) Sup. f. 50, 51, 52. But it is certain, (b) that the plaintiff in an appeal, who appears to have been guilty of such a neglect, cannot demand a restitution by the common law. And the construction I would contend for will appear the more reasonable, if it be considered, that it hardly can be imagined to be the intention of the makers of the statute, to give the party a greater benefit from a conviction grounded on his own evidence, as a conviction on an indictment may be, than from a conviction on the evidence of others, as a conviction in appeal must be.

However, if it shall appear to the Court, upon the evidence at the trial or otherwise, that the party has been
 rea-

reasonably diligent in prosecuting the offence; I readily grant, that the justices may, if they think fit, in their discretion award a restitution, without making any inquiry concerning the fresh suit. But this seems to be no more than they may also do in appeal, if they think fit, as I have already more fully endeavoured to shew in section fifty-two.

As to THE SEVENTH PARTICULAR, viz. Whether there shall be a restitution to any goods not mentioned in the appeal.

Sec. 57. There is no doubt, but that if a man be robbed of several goods by the same person, either at the same different times, and such goods be seized as waifs, &c. and afterwards the party, in his appeal for the robbery, mention some of those goods only, and omit the rest, and the appellee be convicted, &c. the appellant shall be restored to such of the goods only as were mentioned in the appeal, and the rest shall be confiscated, not only in respect of that favour which the law presumes that the appellant beareth to the felon, in making the charge against him easier than it ought to have been, which might possibly have given him an opportunity to have escaped, but also because, as it seemeth, the restitution ought regularly to be grounded on the record of the appeal; and by that no other goods can appear to have been stolen than what are mentioned in it:

But whether an appellant, who had, before his appeal brought, lawfully regained the possession of his goods stolen, shall forfeit to the king such of them as he leaves out of his appeal, doth neither clearly appear from the principal (a) case concerning this matter, nor from any of the books above cited, which seem chiefly to rely on the authority of it.

But there is a special (b) case wherein the appellant shall recover things which were neither stolen from him, nor mentioned in his appeal; as where the appellee sells (c) the things stolen, or exchanges (d) them for some other thing, before the appeal brought, and the money taken on the sale, a thing given in exchange, are seized to the king's use, &c. in which case they shall be delivered to the appellant, on the conviction of the appellee, though they were never in his possession before; for he appears to be in no manner of fault, and there is no reason that he should be prejudiced by the act of the felon. And I take it for granted,

1. Co. Plene 133.
Summary 134.
3. Inst. 227.
5. Coke 110.
8. P. C. 186.
1. Hale 538.

Vide sup. f.
49. 54.

(a) F. Cor.
100.

(b) Vide F.
Cor. 323.
B. Restitu. 22.
Prop. 34.
2. Bulst. 319.
(c) Noy 128.
(d) C. Eliz.
661.

granted, that in all these cases the law is the same at this day in relation to a restitution, by force of the above cited statute of 21. Hen. 8. to the prosecutor of an indictment (4).

(4) A bank note of fifty pounds was stolen from Golightly by one Ferguson: On his being apprehended, several articles of silver plate, a bank note for twenty pounds, and ten guineas in gold, were found upon him, produced on the trial, and placed in the custody of Mr. Reynolds, the clerk of the arraigns. Golightly gave evidence against Ferguson at the Old Bailey, and he was convicted of stealing the fifty pounds bank note. The owner demanded restitution from Reynolds of the goods found upon Ferguson, but as they were not the identical goods which Golightly had lost, Reynolds refused to restore them. But on TROVER being brought before LORD MANSFIELD, they were ordered to be restored, they being the produce of the fifty pounds bank note. Loft 90.—So where a man had stolen cattle and sold them, the money they produced was restored to the owner of the cattle. Noy 128. And the same of gold stolen and changed into silver. Cro. Eliz. 661. But the owner of goods stolen prosecuting the felon to conviction cannot recover the value of them in TROVER from a person who purchases them in *market overt* and sells them again before conviction, notwithstanding the owner give him notice of the robbery while they are in his possession; for in order to maintain TROVER the plaintiff must prove that the goods were his property, and that while they were so they came to the defendant's possession: But he has a right to the *restitution* of the goods *in specie*, and perhaps might recover damages against the person who is fixed with the goods after conviction and refusal to deliver them. Horwood v. Smith, 2. Term Rep. 750. And if a person obtain goods by false pretences and pawn them, and on conviction of the offender the original owner get possession of them again, the pawnbroker may recover them back by an action of Trover from the original owner; for the 21. Hen. 8. c. 11. only gives restitution on a conviction of *felony*, and not on a conviction of *fraud*, Parker v. Patrick, 5. Term Rep. 175.

AND now I am come to AN APPEAL of rape.

For the better understanding of the nature whereof, I shall consider,

1. By whom, and in what manner it may be brought.
2. In what county.
3. Within what time.

As to THE FIRST POINT, viz. By whom and in what manner AN APPEAL of rape may be brought.

Stat. 58. It seems (a) that, by the common law, it might be brought by any woman who had been ravished, against the ravisher, whether such person ravished were the wife (b) of the ravisher, or a free woman, and whether she were a virgin, wife, or widow. Neither (c) do I find that she could be barred of her appeal at the common law, for consenting after the rape to the ravisher, as she may (d) be at this day, by force of the statutes of *Westminster the second*, c. 34. and 6. Rich. 2. c. 6. But it seems that a woman lawfully married, can neither (e) by the common law, nor

(a) Bract. 147. Fleta l. 1. c. 25. f. 14. 2. Inst. 180. See B. 1. c. 41. f. 7. Contra, 2. Inst. 433. Co. Lit. 123. (b) Littleton l. 190. Contra, F. Corone 17. S. P. C. 98. (c) Vide Bracton 147. S. P. C. 61. 148. (d) Vide 2. Inst. 433, 434. 1. Hale 632. Infra f. 59, 60, 61. (e) 3. H. 4. 21. 11. H. 4. 14. S. P. C. 98.

by force of any statute, bring such an appeal without her husband, as one married *de facto* only, and not *de jure*, perhaps may.

Stat. 59. But howsoever the common law might stand in relation to appeals of rape, it seems, that they were wholly taken by the statute of *Westminster the first*, c. 13. by which the offence of rape was reduced to *trespass* only, and consequently punishable only by an action, or indictment, of *trespass*: but afterwards, appeals of rape were given again by the statute of *Westminster the second*, c. 34. by which it is enacted, "That if a man from thenceforth do ravish a woman married, maid, or other, where she did not consent, neither before nor after, he shall have judgment of life and member. And likewise where a man ravisheth a woman married, lady, damsel, or other, with force, although she consent after, he shall have judgment as before is said, if he be attainted at the king's suit, and there the king shall have the suit."

Stat. 60. It seems to be so clear, (a) that this statute (a) 47. Affixe impliedly gives an appeal to the woman who does not consent to the ravisher, that it seems needless to endeavour to prove it; but it is observable, (b) that the statute does not restore the old common law in relation to such appeals, as it would have done, if it had only repealed the abovementioned statute of *Westminster the first*, c. 13. but makes a new law in relation to them; from whence it follows, that all appeals of rape, at this day, must (c) conclude *contra formam statuti*. 6. Littleton, f. 190. 2. Inst. 433. S. P. C. 681. Contra, F. Utlag. 49. B. Corone 169. (b) Vide sup. c. 10. f. 52. (c) 9. Edw. 4. 26.

F. Endit. 18. Dyer 202. Vide *infra* f. 70.

Stat. 61. It is farther enacted by 6. Rich. 2. ft. 1. c. 6. in the following words: "Against the offenders and ravishers of ladies, and the daughters of noblemen, and other women in every part of the realm, in these days offending more violently, and much more than they were wont:" it is ordained and established, "That wheresoever and whensoever such ladies, daughters, and other women aforesaid be ravished, and after such rape do consent to such ravishers, that as well the ravishers as they that be ravished, and every of them, be from thenceforth disabled, and by the same deed be unable to have or challenge all inheritance, dower, or joint feoffment after the death of their husbands and ancestors. And that incontinently in this case, the next of the blood of those ravishers, or of them that be ravished, to whom such inheritance, dower, or joint feoffment ought to revert, remain, or fall after the death,

5. Ed. 4. 6.
3. Coke 61.
Bro. Parl. 89
1. H. 6. 1.

“ death of the ravisher, or of her that is so ravished, shall
 “ have title; that is to say, after the rape to enter upon the
 “ ravisher, or her that is ravished, and their assigns, and
 “ land-tenants, in the same inheritance, dower, or joint
 “ seoffment, and the same to hold in state of inheritance :
 “ And that the husbands of such women, if they have hus-
 “ bands, or if they have no husbands in life, that then the
 “ fathers, or other next of their blood, have from thence-
 “ forth the suit to pursue, and may sue against the same
 “ offenders and ravishers in this behalf, and to have them
 “ thereof convict of life and of member, although the same
 “ women after such rape do consent to the said ravishers.
 “ And the defendant in this case shall not be received to
 “ wage battle, but the truth of the matter shall be tried
 “ by inquisition of the country: Saving always to our
 “ lord the king, and to other lords of the realm, all their es-
 “ cheats of the said ravishers, if peradventure they be the
 “ convict.”

In the construction of this statute the following points have been holden.

(a) 11. H. 4. 13. *Seft.* 62. FIRST, That (a) in an appeal brought upon
 F. Cor. 86. 228. it by a husband for the rape of his wife, it is a good plea
 B. Parlia. 89. that the appellant and woman ravished were never lawfully
 married; which shall be tried by the bishop's certificate, who
 if the marriage were unlawful by reason of precontract,
 &c. ought to certify against the appellant.

(b) 11. H. 4. 14. *Seft.* 63. SECONDLY, That there is no (b) necessity
 F. Cor. 86. to alledge, that the woman did consent to the ravisher, in
 228. count which rehearces the statute, and concludes that the
 S. P. C. 81. rape was against the form of it; which implies, that the
 Dy. 312. 202. woman consented, &c.

(c) 2. Inst. 434. *Seft.* 64. THIRDLY, That (c) if a woman who had
 Vide sup. f. neither husband nor father be ravished by her next of kin
 39. 40. and consent to him, the next of kin to the ravisher shall
 1. Hale 631. have the appeal.

Seft. 65. FOURTHLY, That (d) whosoever happens
 (d) S. P. C. 61. the time to be next heir to the person so ravished, and con-
 (e) F. Affize 27. senting, &c. shall have the appeal, and also enter (e) int
 5. Ed. 4. 6. the lands of the person ravished, and retain them against an
 9. H. 7. 25. other who shall afterwards happen by matter *ex post facto* to
 L. Quin. become heir; and therefore where a woman having issi
 Ed. 4. 60. 61. only a daughter, consents to a ravisher, and the daughter ei
 2. Coke 95. 98. 137.
 3. Coke 61, 62. Plowden 66. 1. Hale 631.

ters, and then a son is born to such woman, the daughter shall retain the lands, because she took them by virtue of a title given by the statute which first vested in her as a purchaser, and never was in any ancestor.

SECT. 66. FIFTHLY, That (a) the next in remainder or reversion, to whom the lands of the woman who consents to a ravisher would come if she were dead, shall enter and retain her lands by virtue of the statute, provided he be of kin to her, albeit another person be nearer; yet it seems, that the persons so intitled to the lands cannot have an appeal of rape, where there is another nearer of kin; for though the clause relating to the entry into the lands seems to intitle such of the next of kin to whom the inheritance would fall after the death of the party, whether they be absolutely nearest or not, yet the clause relating to the appeal seems to extend to none but the husband, or father, or very next of kin.

(a) L. Quin. Edw. 4. 58, 59, 60. B. Ent. Cong. 94. 5. Ed. 4. 5. F. Affize 27.

SECT. 67. SIXTHLY, That it is not (b) sufficient in setting forth the title of the person claiming the lands by virtue of the statute, to say in general, that he is next of blood to whom the inheritance would fall, &c. without shewing specially in what manner he is so, &c.

(b) L. Quin. Ed. 4. 58. Plowden 42, 43.

SECT. 68. SEVENTHLY, That it is not (c) conclusive evidence to prove the woman's consent to the ravisher, to shew, that she lived with him some years as his wife, and had a child by him, if all the time she was under his power, and never at her liberty.

(c) L. Quin. Edw. 4. 59, 60, 61. B. Ent. Cong. 64. 5. Edw. 4. 5.

SECT. 69. EIGHTHLY, That (d) if the party ravished and consenting to the ravisher, be under the age of twelve years, she shall not lose her lands by the intent of the statute, for that the consent of a woman under that age is looked upon as given by one incapable of discretion, and therefore is not regarded by the law.

(d) Plow. 364. Secer. D. Abr. 698. 699, 700. 1. Inf. 79.

SECT. 70. NINTHLY, That (e) in appeals brought on this statute, the count ought to rehearse it; but I do not find any resolution cited to maintain this opinion. It is true indeed, that in the *Year-Book* of 11. Hen. 4. pl. 13, 14. the statute is recited in an appeal grounded on it: But it is not there said to be necessary to be so recited; neither do I find any reason given why an appeal may not as well be grounded on this statute without reciting it, as on the *statute of Westminster the second*, c. 34. as (f) it is agreed that it may be: If it be said, (g) that the common law gave the same appeal as is given by the statute of *Westminster the second*, and therefore there is no need to recite it, but that

(e) S. P. C. 61. See 1. H. 6. 1. B. Rape 4.

(f) S. P. C. 81. See 1. H. 6. 1. B. Rape 4. (g) Vide 5. H. 7. 17.

there never was such an appeal at the common law as is given by the statute of *Richard the second*, and therefore the appeal grounded on it ought to recite it, it may be answered, that the said *statute of Westminster (a)* does not revive the old common law in relation to such appeals, but makes a new law in relation to them; so that appeals brought upon it, do altogether as much depend upon it, as those brought on the statute of *Richard the Second* do on that. Neither (b) does there appear to be any such rule, that in indictments, or actions grounded on statutes which give a remedy in cases which were no way provided for by law, there is a necessity to recite such statutes; and indeed at best it seems but surplus to recite what the Court is bound *ex officio* to take notice of.

(c) Sup. f. 59,
60.

(b) 5. H. 7. 17.
C. Car. 564.
6 Modern 140.

AS TO THE SECOND POINT, *viz.* In what county an appeal of rape may be brought.

ScH. 71. There is no doubt but that this, like all other (c) appeals, is a local action, and consequently ought to be brought in the county wherein the felony was done. And therefore if a man take a woman by force in one county, and carry her into another, and there ravish her, the appeal (d) shall be brought only in the county wherein the rape was committed; for the taking in the other was no more than a trespass, and needs not be taken notice of at all in the appeal of the rape; and if it be, is only looked upon as surplus.

(c) Sup. sect.
35. 47.

(d) 3. H. 7. 12.
F. Visne 28.
B. Appeal 83.
S. P. C. 63.
Summary 186.

AS TO THE THIRD POINT, *viz.* In what time an appeal of rape may be brought.

ScH. 72. It seems, that at this day it may be brought in any reasonable (e) time, the judgment (f) whereof lies in the discretion of the Court, for that at the common law there was no certain time limited for the bringing of it; and the statute of *Westminster the first*, c. 13. by which the offence of rape was turned into a trespass, and forty days limited for the suit of the person ravished, is repealed; and the *statute of Gloucester*, c. 9. which requires that appeals be brought within the year and day, extends only to appeals of death; and the statute of *Westminster the second*, c. 34. which makes rape a felony again, limits no time for the bringing of it, but leaves it to the construction of law, which shall be agreeable to the ancient rules of law in such points wherein the statute is silent.

(e) S. P. C. 63.
Summary 186.
1. Hale 612.
(f) Vide supra,
2. 51, 52.
Littleton 69.
2. Inst. 56.
Sup. sect. 33.
48.

And now I am come to AN APPEAL *of arson* (a).

(a) 1. In. R. 288.

Scilicet 73. But the learning relating to it seeming to be altogether obsolete at this day, I shall refer the reader to old (b) books for it.

(b) Flet. 1. 1.

c. 37.

Brac. 1. 3. c. 27.

HAVING thus endeavoured to shew in what courts appeals may be brought, and the several kinds of them, and examined the particulars which seemed most properly to come under the consideration of each kind, I shall now proceed to examine some other matters concerning them, wherein I shall consider them all together.

In what cases the appellant and the appellee are to appear in proper person, and where by attorney or guardian.

1. How the appellant ought to declare.

3. How he may be nonsuited.

4. For what faults the writ may be abated.

5. What may be pleaded in bar of an appeal.

6. Where the appellant and his abettors shall render damages to the appellee for a false appeal.

7. Where the appellant is to be fined.

AS TO THE FIRST POINT, *viz.* In what cases the appellant and appellee are to appear in proper person, and where by attorney, or guardian.

Scilicet 74. It seems, that by the common law, neither (c) plaintiff nor defendant in any appeal whatsoever, whether of felony or mayhem, (d) could make an attorney, but must appear either by guardian (e) or in proper person, on every (f) day of continuance; except in some special cases, as where the defendant being convicted in an appeal of felony prayed the benefit of his clergy, and the plaintiff replied, that he had been twice married, in which case he might (g) be admitted to go on with the suit by attorney, because he had nothing more to do but to get a certificate of the bigamy from the bishop, which, as it was (h) said, any stranger might procure as well as the plaintiff. *Sed quære*; for it is said, (i) that none can demand execution but the plaintiff, and that the plaintiff cannot do it but in proper person; from whence it seems reasonable to argue,

(c) 2. Inst.

313.

Carth. 55, 56.

3. Modern

268.

Salkeld 59.

62. 64.

B. Attor. 64.

78.

2. Ri. 3. 13.

B. App. 112.

Rastal 47.

(d) 2. Inst.

313.

F. N. B. 27.

Con. F. Attor.

104.

11. H. 7. 39. (e) Sup. f. 30. (f) 1. H. 7. 27. F. Utlag. 34. (g) 40. Aff. 17. F. Attorney 39. 90. 40. Ed. 3. 42. S. P. C. 135. Vide F. Cor. 13. (h) 11. H. 7. 14. S. P. C. 135. F. Corone 13. (i) 21. Edw. 4. 72, 73.

that he ought, in all other cases, as well to carry on his suit in proper person. But it seems (a) clear, that after a defendant is acquitted, he may appear by attorney for the recovery of his damages against the abettors, &c. And it is enacted (b) by 3. Hen. 7. c. 1. "That the appellant, in any appeals of murder or the death of a man, where battel by the course of common law lies not, may make attorney and appear in the same, in the said appeals after they be commenced, to the end of the suit and execution of the same." But (c) if a defendant or plaintiff appear and plead by attorney where they ought not, and the Court receive the plea and adjourn the cause, it seems, that the appeal is discontinued, because such appearance was merely void in law.

(a) 8. Edw. 4. 3. F. Attorney
24.
(b) F. N. B. 26.
(c) Salk. 59, 60.
Carthew 56.
Skinner 670.
An appellant must appear once, personally, before he can make an attorney. Skinner 48. Carthew 594.

As to THE SECOND POINT, viz. In what manner the appellant ought to declare; I shall refer the reader for precedents of counts in appeal, to *Staundford's (d) Pleas of the Crown*, and the Book (e) of Entries, and shall in this place consider only the following particulars.

(d) S. P. C. 78, 79.
(e) Rastall and Coke's Entries, Titles Appeal and Mort. Tremaine 15. to 33.

1. In what manner such count must pursue the writ.
2. How it ought to set forth the substance and matter of fact.
3. How the circumstances of time and place.
4. Whether one and the same count ought to be against those who do not appear as well as against those who do appear, and against the accessaries as well as the principals.

As to THE FIRST PARTICULAR, viz. In what manner the count in appeal must pursue the writ.

Sec. 75. I shall take it for granted, that this, like all other counts in other actions, must in substance (f) agree with the writ, which shall be abated, if the count vary from it in any material point. And therefore, in a common appeal of death, if the appellant declare, that the appellee traitorously killed the person deceased, as he was going to succour the king in his wars, the writ shall be abated, (g) because that contains no charge of treason. So also if the plaintiff, in an appeal of mayhem, declare that the appellee beat as well as maimed him, the writ shall be abated, (b) because that mentions not any battery.

(f) Finch 357.
(g) B. App. 12. 45. Ed. 3. 25. 21. Ed. 3. 23. S. P. C. 78. (b) F. Cor. 110. Sup. Sect. 2c.

As to THE SECOND PARTICULAR, *viz.* In what manner the count in appeal ought to set forth the substance and manner of the fact; I shall observe the following particulars.

Sec. 76. FIRST, That where several are present at the fact, and one only actually does it, and the others abet and encourage him, it is in the election of the plaintiff, either to suppose (a) in his declaration, that every one of them did the fact, because in such a case the act of one is, in the judgment of the law, the act of all; or to shew the special manner of the case as in truth it was, and set forth the fact to have been done only by the person who did it, and the others to have been his abettors, &c.

(a) 11. H. 4. 13. 4. H. 7. 18. S. P. C. 44. 80. Sup. sect. 19. Summary 187. Post. c. 29. (b) 4. Coke 41. F. Cor. 97. 216. 40. Afsizc 25. 44. Edw. 3. 38. Rastal 43. 45, 46, 47. Coke's Entries 57, &c. See the Case of Midwinter and Simis, Foster, Crown Law, 3d. edit. 415.

Sec. 77. SECONDLY, That no periphrasis, (c) or circumlocution whatsoever, will supply the want of those words of art which the law hath appropriated for the description of the offence; from whence it follows, that an appeal of death cannot (d) amount to a charge of murder without the word *murdravit*, let it be never so exact and particular in setting forth the malice and all other circumstances of the killing; neither (e) can an appeal of rape be sufficient without the word *rapuit*; nor (f) an appeal of larceny without the word *cepit*; nor (g) an appeal of *mayhem* without the word *mayhemavit*; nor any (h) of the appeals abovementioned without the word *felonicè*.

(c) 5. Co. 121. (d) Dyer 261. Farrelly 16. Cro. Jac. 20. Salkeld 377. 1. Ed. 4. 26. (e) S. P. C. 82. 24. 96. 9. Ed. 4. 26. 20. H. 7. 7. 1. Inst. 124. (f) Endict. 2. 8. S. P. C. 96. Summary 207. (g) Sup. sect. 17. (h) S. P. C. 91. 96. Summary 206, 207. 20. H. 7. 7. 1. Bullt. 93. Cro. Jac. 20. Dyer 202. Qu. 1. H. 6. 1. Con. F. Endict. 26. Dyer 69.

Sec. 78. THIRDLY, That in every appeal of larceny (i) it must expressly appear whose the goods were that were stolen; and in every appeal of death, (k) who the person was that was killed; because otherwise it cannot appear that the plaintiff is intitled to the appeal; yet an indictment *de morte ejusdam ignoti*, or for feloniously stealing (m) the goods *ejusdam ignoti*, is good; for it is sufficient, that the person injured was under the protection of the law.

(i) Rastal 51, 54, 55. (k) F. Endict. 10. S. P. C. 95. 181. 22. Afsizc 94. (l) Sum. 207. 22. Afsizc 94. F. Corone 159. S. P. C. 94. 181. 1. Afsizc 7. Dyer 96. (m) F. Endict. 9. 12. Summary 207. 1. Hale 512. 2. Hale 181. S. P. C. 95. 181. Dyer 99. Keilwood 25. Moor 466. 18. Afsizc 15. Con. 9. H. 6. 45.

Sec. 79. FOURTHLY, That in an appeal of rape the fact seems to be sufficiently (n) declared, by shewing, that the defendant *felonicè rapuit* the woman, without adding the words *carnaliter cognovit*, or any others tantamount, or first shewing the particular manner of the terror or violence, and then

(n) Dyer 202. 11. H. 4. 13. F. Co. 86. S. P. C. 81. Summary 187.

then concluding, that the defendant *sic felonice rapuit*. Also it seems, (a) that the like general manner of setting forth the fact, is sufficient in an appeal of larceny. But it seems to be usual, in appeals of larceny, to set forth the price of the things stolen: but whether this be necessary for any other purpose than to shew, that the crime amounts to grand larceny, and to ascertain the goods, in order thereby the better to intitle the appellant to a restitution, I leave to be considered. But (b) in an *appeal of mayhem* it seems necessary; first, to set forth particularly in what manner the hurt was done, and the consequence following it; and then to conclude, that the defendant *sic felonice mayhemavit* the appellant.

Also it seems clear, (c) that in an *appeal of death* it is necessary, not only from the *statute of Gloucester* c. 9. which requires, that an appeal of death shall declare the deed; but also from the common law, first, to set forth in the count all the special circumstances of the fact; and (c) then to conclude, that the appellee *sic felonice murderavit* the party.

(a) Rastal 43, 54, 55.
(b) Rastal 45, 46, and Coke's Entries 50, 51, 52, 53.
(c) Rastal 46, 47, &c. Coke's Ent. 53, 54, &c. Salkeld 377. Farrelly 16.
(d) 1. Inst. 318, 319.
2. Lev. 140.
141. 5. Co. 120, 121, 122. (e) 4. Coke 47.

And this being the appeal most in use at this day, it may not be improper to set down these following rules concerning this matter.

Sec. 80. FIRST, That every such count ought to set forth in what part (f) of the body the wound was given; in which respect the same certainty seems to be required in appeals as in indictments; and therefore, if the count say only, that the wound was given *circa pectus*, it seems to be vicious, as it hath been resolved, (g) that an indictment in the like manner uncertain is, because it doth not ascertain the part wounded, which, for what appears, might have been the neck, arm, or belly; and for the like reason such count seems also to be vicious, if it say, that the wound was in the hand, or leg, or arm, without (h) shewing whether it was the right or left; neither (i) is such an uncertainty holpen by laying other wounds with sufficient certainty, if there be a general conclusion that the party died of the wounds above-mentioned; because the death being as much imputed to the wound that is insufficiently laid, as to the others, it appears not but that it might be chiefly owing to that which is insufficiently laid, and therefore the whole is insufficient. But it hath been resolved, that it is sufficient in an indictment of death, and therefore it seems also to be sufficient in an appeal, to shew, that the wound was given in

in the left (a) part of the belly, or in the left part of the side, or in the left hand, or in the left arm, or in the face, or in the breast, or in the belly, or even in the fore part of the body, in which case the word "body" shall be understood of the trunk of the body, between the neck and thighs. And it hath been resolved, (b) that where there is such a sufficient certainty, the addition of a farther uncertain or unintelligible description, will do no hurt; as where a wound is laid in *sinistra parte veniris circa umbilicum, &c.* in which case the last words shall be rejected as abundant and surplus.

SECT. 81. SECONDLY, Such count ought also (c) to shew the length and breadth of the wound, that it may appear to the Court that it was mortal; but it is said, (d) that anciently this was not required: And if a man be shot, or run through the body, with a bullet or sword, &c. it seems (e) sufficient to say, that the defendant with malice, &c. struck the person killed in such a part of his body, and gave him in such part *mortale vulnus penetrans in et per corpus, &c.* for this sufficiently shews that the wound was mortal. Also in some cases it is impossible to shew the length and breadth of the wound where a limb is cut off, and (f) therefore it is plain, that in such cases it cannot be required.

SECT. 82. THIRDLY, It is not safe (g) in any such count to omit the word "*percussit*," where the fact will bear it; and by the authority of some (h) books this cannot be supplied, in such cases, by the words "*dedit mortale vulnus, &c.*" nor by any other: Yet in *Croke's* (i) Reports this opinion seems to be questioned; neither do I find any reason given why the word "*percussit*" should be of such absolute necessity, for it is not so much as pretended in *Long's* (k) Case, which seems to be the chief foundation of this opinion, that this is a word of art appropriated to this use; but all that seems there contended for is, that where the death was occasioned by any external violence, coming under the notion of striking, it must expressly appear, that a stroke was given. Nor does the law admit of a less exact certainty, as to the setting forth the fact, where the death was occasioned by any other means, as by poison, &c. for it hath been resolved, (l) that an indictment (which in this respect seems not to differ from an appeal) setting forth, that *J. S.* persuaded the person deceased to take a certain poisonous potion under a notion of a medicine, and that the deceased, *nesciens præd' potum cum veneno fore intoxicatum, sed fidem adhibens dictæ persuasioni dicti J. S. recepit et bibit*, is insufficient, because it doth not expressly say,

say, that the party received and drank the poison. And it was also resolved, that the want of such certainty is not supplied by these words immediately following, "*per quod idem N. immèd atè post receptionem veneni prædicti per tres horas immèd atè sequentes languebat et obiit, &c.*" and yet there cannot well be a stronger implication that the poison was taken and drank by him; for it being the strict (a) rule of law in these cases to have the substance of the fact expressed with precise certainty, the Judges will suffer no argumentative certainty whatsoever to induce them to dispense with it. For if they should once be prevailed with to do it in one case, the like indulgence would be expected from them in others nearly resembling it, and then in others resembling those, and no one could say where this might end; which could not but endanger the subverting of one of the most fundamental principles of the law, by giving room to Judges, by arguments from what the jury have found, to convict a man of a fact which they have not found.

- (a) 4. Co. 44. *See* 83. FOURTHLY, Such count (b) ought also expressly to shew that the party died of the hurt specially set forth; and it hath been resolved, (c) that an indictment, and from the same reason it seems that an appeal, setting forth that the defendant choked the deceased, *qua suffocatione obiit*, instead of *de qua suffocatione*, &c. is erroneous. Yet where the death was caused by divers poisons, or wounds, &c. the count may say in general, that the party died of the several poisons or wounds abovementioned, without (d) saying, that he died of any one of them in particular; for perhaps the truth of the case might be, that none of them alone, but all together caused the death. Or the count in such case perhaps may say, that the party died of the first poison or wound, and that he would have died of the second, if he had not died of the first, and also that he would have died of the third, if he had not died of the two first.

- See* 84. FIFTHLY, If the killing were with a weapon, the count must shew (e) with what weapon in particular; and yet if upon the evidence it shall appear that the killing was not by such weapon, but by some other, the variance (f) is immaterial, and the appellee ought to be convicted, as shall be shewn more at large under the *Chapter of Evidence*. And if the killing were not by a weapon, but by some other means, as by poisoning, drowning, suffocating, burning, or the like, the count (g) must set forth the circumstances of the fact as specially as the nature of it will admit. But in such cases, where no weapon was used, it cannot

cannot but be absurd to require the mention of one in the appeal, and therefore the *statute of Gloucester*, c. 9. which directs generally, that in all appeals of death the weapon must be set forth, is to be intended only (a) of such killing in which a weapon was used : For the law is so far from requiring it in other cases, that it will not suffer an appeal of killing by a weapon to be maintained by evidence of killing by any other means in which no weapon was used ; neither will it suffer an appeal of killing by any of those means without the help of a weapon, to be maintained by evidence of killing by a weapon, as shall also be shewn more at large in the chapter above referred to.

Scot. 85. It hath been adjudged (b), that the words “ *vi et armis* ” are not necessary in such appeal, because they are so fully implied. (b) *Smith v. Bowden*, Mic. 7. Ann. 8.

As to THE THIRD PARTICULAR, *viz.* In what manner the count in appeal must set forth the circumstances of time and place.

Scot. 86. It is enacted by the *statute of Gloucester*, c. 9. “ That if an appeal declare the deed, the year, the day, the hour, the time of the king, and the town where the deed was done, and with what weapon, the appeal shall stand in effect, &c.” And though this more particularly relates (c) to appeals of death, yet it seems also to be generally a good rule as to the circumstances of time and place in other appeals. (c) 2. Inst. 317.

And therefore I shall consider them all together ; and first premise, (d) that no omission of any of these circumstances, where the law requires them to be expressly set forth, can be aided by the conviction of the defendant. (d) 1. R. Abr. 781.

For the better understanding in what cases the law requires them to be expressly set forth, I shall endeavour to shew what certainty the count in every appeal ought to shew.

1. The hour.
2. The day.
3. The year and time of the king.
4. The place where the deed was done.

As to the first of these particulars, *viz.* With what certainty the count in appeal ought to set forth the hour.

See Sect. 87. It is observable, that all (a) the precedents of such counts (excepting only one) (b), in appeals of *larceny* in *Rastal's Entries*, which seems to be the only book of authority in which any such counts are to be found; and also all the precedents in *Coke* and *Rastal* of such counts in appeals of (c) *mayhem*, take notice of the hour, as well as those in appeals of *death*; (d) and therefore certainly it is not safe wholly to omit it: yet it hath been holden, (e) that such an omission is not fatal, even in an appeal of death; because the common law did not require the mention of the hour, and the statute abovementioned is in the affirmative. Yet if the hour as well as the day be set forth in the allegation of the offence of the principal, it is said to be fatal to mention the day only of the allegation of the offence of the accessory. But it seems that there is no necessity in any case precisely to alledge, that the fact was done at such an hour, but that it is sufficient to say, that it was done about such an hour, as appears from every (f) one of the precedents in *Coke* and *Rastal*, in which the hour is mentioned, and also from other (g) good authorities; yet we find the contrary opinion holden by three Judges against two in *Bulstrode's Reports*. But it seems (i) certain that a mistake of the hour will not be material upon evidence.

(a) *Rastal* 53, 54.
(b) *Rastal* 55.
(c) *Co. Ent.* 50, 51, 52.
Rastal 45.
(d) *Co. Ent.* 53, 56, 57, 59.
Rastal 43, 46, 47, 48, 49, 50, &c.
(e) *S. P. C.* 80.
1. Bulst. 82.
Summary 187.
(f) *Co. Ent.* 50, 51, 52, 53, 56, 57, 59.
Rastal 43, 45, 46, 47, 48, 49, 50, 57.
(g) *2. Inst.* 318.
Salkeld 59.
Skinner 443. 553. 4. *Modern* 292. *Carthew* 17, 333. *Trem.* 15, 21. (b) *1. Bulst.* 77, 80, 81, 82, 83. *Vide* 3. *Modern* 158. (c) *Sum.* 264. 2. *Inst.* 318.

As to the second of the abovementioned particulars, *viz.* With what certainty the count in appeal ought to set forth the day.

See Sect. 88. There can be no doubt but that every such count must set forth the day on which the fact was done, as appears from all the precedents cited in the foregoing section; and also from the common form of all other declarations in all actions whatsoever, as well as of indictments, for which it is needless to cite authorities. And if the fact happened in the night, it seems (k) most proper to alledge it in *nocte ejusdem diei*. But it is said not to (l) be sufficient to alledge the fact done about such a day, or between such a day and such a day, but that the very day must be precisely set forth. And it seems to be insufficient to alledge (m) it on the feast day of such a saint, without an addition, if there be another saint of the same name, as on *St. John's day*, without

(k) *2. Inst.* 318.
(l) *2. Inst.* 318.
(m) *B. Indict.* 47.
3. H. 7. 5.

without shewing which saint is meant, viz. *the Baptist or the Evangelist*. Also (a) it seems to be erroneous to set forth the fact on an impossible day, as on the thirty-first of *June*, or thirtieth of *February*, for this is of no more effect than to mention no day at all. Also it seems clear that an appeal of death must not only set forth the day when the hurt was given, but also the day when the party died of it, as appears from all the precedents (b) of this kind both in *Coke* and *Rastal*; and also from the manifest reason of the thing, (c) that it may appear that the party died within the year and day after the stroke, in which case (d) only the law intends that the death was occasioned by it.

(a) Moor 555.

(b) See citations in the precedent section.

(c) 2. Inst. 318.

B. Indist. 41.

(d) B. 1. c. 31. f. 9, 10.

And it is (e) said not to be sufficient to alledge, that the defendant assaulted the party at a certain day, and feloniously struck him, without expressly adding, that he struck him *adunc et ibidem*: and yet both sentences being joined with the copulative, it is the most natural import of the whole, that the stroke and assault were both at the same time, &c. and such certainty seems to be sufficient in declarations (f) in civil actions, and even in indictments (g) of trespasses. But in indictments and appeals of death a more express certainty is said to be required, because the stroke which caused the death, being a crime of a different nature, and much higher than the assault, may be well enough intended to have happened at a different time; and therefore the precise time of each must certainly be expressed. And even this may be vitiated by a repugnancy in the conclusion; as if the assault and stroke be alledged in the premises on the tenth of *December*, and the death subsequent on the twentieth of *December* following, and then it be alledged in the conclusion, that the defendant in such manner feloniously murdered the party on the tenth of *December* aforesaid, the whole is naught for the repugnancy; (h) because the party could not be said to have been murdered, till he was dead: And though to some purposes, by a fiction of law, the offence of the defendant after the death of the party, is punished as a felony from the time of the stroke, yet in truth and propriety of speech (which must be observed in legal proceedings) it is not a felony but only a trespass 'till the death; yet if in such conclusion it had been alledged that the defendant in such manner feloniously murdered the party on the twentieth of *December* aforesaid, it had been sufficient. But it is said (i) to be the better way to conclude generally, that the defendant in such manner feloniously murdered the party. And it is certain (k) that a mistake of the day will not be material upon evidence.

(e) Dyer 28. a. in the margin.

Dyer 8.

See B. 1. c.

64. f. 42.

Keilw. 100.

Qu.

(f) C. Jac.

362. 443.

(g) C. Car.

271. 515.

C. Jac. 41.

See B. 1. c.

64. f. 42.

1. Roll. 295.

(b) 4. Co. 47.

Summar y 207.

2. Inst. 318.

Nov 415.

Heile 35.

Dyer 50.

Qu. Cro. Eliz.

739.

(i) 4. Co. 42.

2. Inst. 318.

(k) Sum. 264.

2. Inst. 318.

Sect. 89. It hath been holden that an allegation of the day, *prima facie* somewhat uncertain, may be holpen by the ap-

- (a) Dyer 164. apparent sense of the whole ; as where (a) it is alledged, 60. that the principal such a day made the assault and gave the stroke, and that the party died on such a subsequent day, C. Eliz. 176. &c. and that *A. B.* was *adtunc et ibidem abettans* the said Qu. C. Eliz. principal to do the felony and murder aforesaid ; in which 739. case it is said that the words *adtunc et ibidem*, from the manifest import of the whole, shall be referred to the time of the stroke ; because by that only the felony, which *A. B.* is charged to have abetted, was done. Yet if *A. B.* had been said to have been present at the time of the felony and murder aforesaid, *scilicet* on the day of the stroke, *tunc et ibidem* abetting the felony and murder aforesaid, &c. it seems (b) that the appeal is insufficient as to the said *A. B.* for the repugnancy ; because he is expressly alledged to have been present, and to have abetted the principal, at the time of the felony and murder, which must be taken for the time of the death, by which the offence, which was before but a trespass, became felony and murder, but by being present at the time of the death, it is impossible he could abet a stroke given so long before ; and therefore it is repugnant and inconsistent in such a manner to alledge it. Nor is such a repugnancy any way holpen by the subsequent allegation of the very day of the stroke, coming after the word "*scilicet*," for it is apparent that the time of the felony could not be on the day of the stroke, and therefore it rather adds to than helps the fault to alledge that it was. But (c) the best way of alledging such abetment had been to have set forth, that the said *A. B.* was *præsens, auxilians, &c. ad feloniam et murdrum prædictum in formâ prædictâ faciend.*
- See Foster's Crown Law 65. 67.
- (c) 4. Coke 42.

As to the third particular, *viz.* With what certainty the count in appeal ought to set forth the year and time of the king.

- Sec.* 90. There can be no doubt but that every such count must expressly set forth in what year the fact was done, as appears from the known form of all other counts, and also of indictments. And in an appeal of death it is certainly necessary (d) to set forth not only the year in which the stroke was given, but also that in which the death happened, that it may appear that the death happened within the year and day after the stroke. But it seems clear from all the precedents, that it is sufficient to shew in what year of the king's reign the fact was done, and the death happened, without shewing the year of the Lord. Also it hath been adjudged, (e) that it is sufficient to alledge the fact in such a year of such a king, without saying it was in such a year of his reign, because it is clearly implied.
- (d) 2. Inst. 318, 319. B. Indict. 41. B. 1. c. 31. f. 9, 10.
- (e) 1. Lev. 140. Sec 1. Sid. 140.

As

As to the fourth particular, *viz.* With what certainty the count in appeal ought to set forth the place where the deed was done.

Sett. 91. There can be no doubt but that every count in an appeal of death must shew (a) the place where the death happened, as well as that where the hurt was given, and this with the same (b) precise certainty and freedom from repugnancy (c) as is required in relation to the time of the death and hurt, for which I shall refer the reader to the 89th and 90th sections of this chapter, wherein what is said in relation to the time of the hurt and death is equally applicable to the place. Also it seems that a mistake of the place is not (d) material upon evidence upon *not guilty* pleaded, any more than a mistake of the time, provided the fact be proved at some other place in the same county.

(a) Hetley 35.
C. Eliz. 137.
738, 739.
(b) Dyer 68.
(c) Noy 45.
Dyer 50.
C. Eliz. 196.
(d) Sum. 264.
265.
Salkeld 288.

Sett. 92. But it seems to be not only necessary in an appeal of death to alledge some place both of the death and hurt, and in every count in every other appeal to alledge some place where the fact was committed, but also that such allegation be in proper place.

For the better understanding whereof I shall premise, that if the truth will bear it, it is safest (e) to lay it in a town, as the *statute of Gloucester* abovementioned directs. But if it were done out of a town, it seems that you may lay it in any other place from whence a *vifne* may come.

(e) F. Cor. 80.
2. Inst. 319.
3. Mod. 158.
4. Mod. 290.
Salkeld 59, 60

In relation to which matter the law being in great measure superseded in civil actions by the statute FOR THE AMENDMENT OF THE LAW, and chiefly in use in criminal clauses, it may not be improper in this place more fully to consider it.

And for that purpose I shall lay it down as a good general rule, that a *vifne* may come from any place, which is of so small compass, that all who live in or near it may reasonably be presumed to have some knowledge of the persons living in it, and therefore are esteemed the most proper judges of the facts done within its limits, as being most likely to be proved by witnesses, and charged upon persons with whose integrity and reputation they are best acquainted.

And upon this ground it hath been adjudged, that a *vifne* may come not only from a town, but from (f) a (f) Yel. 159.
ward, (g) parish, hamlet, (b) burgh, manor, (i) castle, (k) or
ward, (g) parish, hamlet, (b) burgh, manor, (i) castle, (k) or
(g) 6. Coke 14. Co. Lit. 125. Salkeld 60. (b) Co. Lit. 125. C. Eliz. 866.
1. Sid. 226. (i) 2. R. Abr. 612, 613, 614, 618. Coke Littleton 125. C. Jac. 405
(k) 2. R. Abr. 618, 621. Co. Lit. 125.

- (a) C. Eliz. 200.
1. Sid. 326.
2. R. Abr. 621.
B. App. 19.
Vide Co. Lit. 125.
Con.
B. App. 127.
(b) 6. H. 7.3.
Co. Lit. 125.
a. Inf. 319.
1. Sid. 326.
(c) B. Plead. 61.
Co. Lit. 125.
2. R. Abr. 54.
1. Sid. 88.
Con.
1. Sid. 326.
Carthew 333.
Skin. 554.
(d) C. Eliz. 732.
1. Sid. 326.
(e) B. Plead. 61.
6. H. 7.3.
2. R. Abr. 621.
7. H. 4. 27.
Sec. 2. R. Abr. 626.
1. Sid. 88.
(f) C. Eliz. 200.
7. H. 4. 27.
2. R. Abr. 621.
(g) See the cases cited under letter c. 7. H. 4. 27. Salkeld 59, 60. Co. Lit. 125.
4. Coke 14. 2. Inf. 319. (b) 2. R. Abr. 622, 623. 8. H. 5. 10. C. Jac. 307, 308.
2. Hale 262. Con. S. P. C. 155. (i) See the authorities cited under letter a.
(k) 1. Sid. 178. C. Jac. 307. 2. R. Abr. 622. C. Jac. 150. Qu. C. Eliz. 732.
Con. S. P. C. 154. 2. R. Abr. 617. (l) C. Eliz. 732.
- Sett. 93.* It hath been alledged that no (m) *visne* can come from the *weald* of *Sussex*, not only by reason of the largeness of its extent, but also because it shall be taken for a wood without inhabitants; and therefore it would seem inconsistent to award the return of a jury from it. And yet it hath been holden (n) that a *visne* may come from a park; also it seems to be the general opinion, that a *visne* may come from a forest, as hath been more fully shewn in the precedent section; from whence it may plausibly be argued, that it may come as well from such a *weald*, supposing it to be a wood. Also it seems (o) to be questionable whether a *visne* may not come from a walk in a forest, being alledged as a place in which a fact was done; but it seems clear that no *visne* can come from it, if it be alledged
- (m) 1. Sid. 88.
2. R. Abr. 617.
Hob. 266.
(n) 1. Sid. 327.
(o) 2. Lev. 327.
Con. 1. Sid. 326.
1. Sid. 327.

ledged only as a liberty, for that no *visne* can come from a thing incorporeal, (a) but only from a place. Also it hath been holden that no *visne* (b) can come from the *seignie of a manor*, perhaps for this reason, because it doth not properly signify a place, but rather the limits and situation of a place.

(a) 1. Sid. 316.
(b) 2. R. Abr. 618.
Summary 188.

As to THE FOURTH PARTICULAR, *viz.* Whether one and the same count in appeal ought to be against those who do not appear, as well as against those who do appear, and against the accessaries as well as the principals.

Sec. 94. It is said by *Sir Matthew Hale*, that in an appeal against *A. B. and C.* if *A.* only appear, yet the plaintiff ought to count against them all, by the better opinion. And the like seems also to be holden by *Sir William Staundford* (c) and *Brook* (d); yet the point adjudged in the principal (e) case, which seems to be the chief foundation of these opinions, seems to be no more than this, that where an appellant hath had judgment and execution in one appeal, he shall not afterwards have another against persons not named in the first. And all the precedents that I can find, either in *Coke* (f) or in *Rastal*, (g) of counts in appeals, wherein some of the defendants have not appeared, do indeed mention the persons absent, as well as those present, and shew in what manner they were guilty; yet are all of them exprest that the appellant *instante appellat* those that appear only; and that he would in like manner appeal those that are absent, if they were present; by which it seems clearly to be implied, that when they shall appear, there shall be another declaration against them, and that the present declaration is esteemed only as a declaration against those that do appear. Neither do I find any difference in the precedents abovementioned, as to the form of such counts in relation to this matter where the persons not appearing are accessaries, from that wherein they are principals. But whether the omitting of a person in one appeal be always a good bar to the charging of him in another, shall be considered in the following part of the chapter, wherein I shall treat of the nature of pleas in bar to appeals.

(c) S. P. C. 65.
(d) B. App. 28.
(e) 9. H. 4. 1.
4. Coke 47.
Dyer 120.

(f) Co. Ent. 50.
(g) Rast. 46;
47. 50, 51.
53. 54.
Sec 47. Assize.

As to THE THIRD PARTICULAR, *viz.* How the appellant may be non-suited.

Sec. 95. It is generally holden in some books, (b) that, by the common law, if a plaintiff, in any action whatsoever,

(b) B. Nonf. 44.
C. Lit. 139.
B. Nonf. 6.

1. Roll. A. 131, 132. 3. Edw. 4. 11. Con. F. Nonf. 15. 34. Qu. 20. H. 6. 44. 2. Bullf. 19.

- be demanded at any day of continuance before judgment, and do not appear, either in (a) proper person, or by attorney, or guardian, as the law requires, he shall be nonsuited, whatsoever (b) excuse he may have for his absence. But it is enacted by 2. Hen. c. 7. 4. that if the verdict pass against the plaintiff, the same plaintiff shall not be nonsuited. And since the statute it hath been adjudged, (c) that if a defendant in an appeal of murder be found guilty of manslaughter only, the appellant cannot be nonsuited; but it doth not appear whether this resolution be grounded on the said statute, or on the common law; for it seems difficult to maintain that such a verdict which finds the substance of the fact, shall be said to pass against the appellant, in which case only the nonsuit is taken away by the statute. And therefore perhaps a nonsuit in this case may not be suffered by the common law, which seems not to have permitted a nonsuit after a full verdict, except in such cases only whereupon some doubt remained with the Court, as may be reasonably argued from the authorities above cited under letter (b). But it seems that an appellant may be nonsuited after a special (d) verdict, or after a demurrer (e) and argument thereupon.
- (a) Vide sup. f. 74.
 (b) Noy 88. Latch. 173. Vide sup. 30.
 (c) Moor 407. C. Eliz. 465.
 (d) 2. Jones 1.
 (e) Co. Lit. 139. 2. Jones 1.
 See 10. H. 6. 44. and the authorities cited under letter (b) in the preceding page.

As to THE FOURTH PARTICULAR, 'viz.' For what faults the writ may be abated.

- See. 96. I shall premise, that in order to take advantage of a defect in the writ itself, the appellee (f) ought to demand *oyer* (1) of it, which he must do in open (g) court (2).
- (f) 2. Bulst. 49.
 3. Bulst. 343.
 (1) Bigby v. Kennedy, Black. 713.
 (g) Widdrington v. Charlton, agreed Mich. 10. Annæ.

(2) The writ in an appeal is an original issuing out of chancery returnable into the king's bench only; before the return thereof, the court of Chancery only can set it aside, where it appears to have issued *erroneè* or *improvidè*, by some error extrinsic to the writ itself; but for any error or defect on the face of it, it may be quashed after it is returned into the king's bench. Bac. Abr. 126. and see Eq. Caf. Abr. 416.

And for the better understanding for what faults such writ shall be abated, I shall consider the following particulars.

1

1. Where it may be abated by the Court *ex officio*.
2. Where upon the exception, or plea of the party, but not without such exception or plea.
3. What defects of this kind may be amended, which without such amendment might abate the writ.

3. What

As to the first particular, *viz.* Where the writ in appeal may be abated by the Court *ex officio*.

It seems, that the writ may be abated by the Court *ex officio*, (a) for the following faults, whether the party take notice of them or not. (a) Finch 226. 2. Danv. Abr. 252. Sup. f. 42.

SECT. 97. FIRST, (b) Where a writ or declaration wants those words of art which are appropriated by law for the description of the offence; as where an appeal of burglary has the word "burgaliter" instead of "burgulariter," or "burglariter;" or an appeal of rape wants the word "rapuit," (d) or any appeal wants the word "felonice" (e). (b) Vide sup. f. 77. (c) 4. Co. 39. (d) Sup. f. 77. (e) Sup. f. 77.

SECT. 98. SECONDLY, Where the declaration varies from the writ; as (f) by laying the offence, in the reign of a present king, where the writ supposed it to have been in the reign of a former king: Or by giving the defendant a name different from that in the writ; as where the writ calls him A. B. of C. alderman, and the declaration A. B. of C. esquire: Or where the declaration is otherwise, (b) defective in not pursuing the writ, or in not setting forth both the substance (i) and the circumstances (k) of the fact with that certainty which the law requires: Or in (l) laying the offence in a different county from that in which the writ was brought. (f) F. Brief 219. 231. (g) Yel. 120. (h) Sup. f. 75. (i) Sup. f. 76. &c. (k) Sup. f. 86. &c. (l) Sup. f. 35. 47. 71. B. Appeal 38.

SECT. 99. THIRDLY, Where (m) the declaration doth not conclude *contra formam statuti* in such cases where by law it ought. (m) Sup. f. 60.

SECT. 100. FOURTHLY, Where the sense is defective for want of a material word in the writ; as (n) if the conclusion be "*ibi hoc breve, &c.*" without the word "*habeas*;" or where there is a false concord in the writ, as *hæc* (o) or *hanc breve*; or the singular (p) number instead of the plural; or (as some (q) seem to hold generally) any other false Latin; or even the use of a word which is not Latin, though (r) by the change or addition of a letter it might be made so. But it seems that such faults in the declaration are not fatal if the writ or bill on the file be right, as shall be shewn more at large in the following part of this chapter. (n) F. Cor. 121. S. P. C. 82. (o) 9. H. 7. 16. (p) 10. Ed. 3. 1. (q) Sum. 189. S. P. C. 82. 5. Coke 121. (r) 2. H. 4. 8.

SECT. 101. FIFTHLY, Generally where the writ or declaration are any otherwise defective in not observing the legal form; as (s) where in a writ of appeal sued by a husband and wife, the conclusion is in the name of the

(a) Finch 253. wife only: Or where the writ omits (a) either the name of baptism or the surname of the appellant or appellee, being under the degree of nobility, which alone can give so high (b) a name of dignity as to supply the want of a surname.
 27. H. 6. 3.
 2. Infl. 665.
 (b) Finch 253.
 8. Ed. 4. 24.
 2. Infl. 666.
 25. Ed. 3. 39.

As to the second particular, *viz.* Where the writ may be abated upon the plea or exception of the party, but not without such plea or exception; I shall endeavour to shew,

1. Where it may be so abated for the want of fifteen days between the *teste* and the return of the writ.

2. Where for a *misnomer* or wrong addition.

3. Where for a defect in the addition of the appellant or appellee.

4. Where for the multiplicity of action.

5. Where for making of *J. S.* a defendant, where there is no such person.

6. Whether the defendant may have more than one of such pleas or exceptions.

As to THE FIRST POINT, *viz.* Where a writ of appeal may be abated upon the exception or plea of the party for the want of fifteen days between its *teste* and return.

Sec. 102. If the party, before he hath pleaded in chief, do especially shew to the Court such a defect in the writ, the latter authorities (c) seem to incline that it ought to be abated, because the writ is the foundation of the whole proceeding, and the law seems to be in nothing more curious than in strictly keeping up its legal forms. Yet it hath been resolved, (d) that such a defect is salved by the party's coming in and pleading in chief without taking advantage of it: Also it hath been adjudged, that where the original is right, all defects in the *mesne process* are salved by the party's appearance, as shall be shewn more at large in the chapter concerning PROCESS.

(c) Salkeid 63.
 2. Infl. 667.
 C. Jac. 424.
 2. Ventris 7.
 1. Sid. 406.
 Con. 12. Ed.
 4. 11.
 B. Error 169.
 (d) Salkeid 63.

As to THE SECOND POINT, viz. Where a writ of appeal may be abated, upon the exception or plea of the party, for a *misnomer* or wrong addition.

Sec. 103. It seems to be agreed, (a) that if there be a mistake in the writ or declaration as to the name of baptism, (b) or surname (c) of the appellant, (d) or appellee; or (e) as to the town parish or county, estate degree or mystery, whereof they are said to be; as where (f) one who is neither by birth, office, creation, or reputation, an esquire or gentleman, is named with either of those additions; or where a gentleman by birth, who follows the trade of husbandry, is named (g) with the addition of the trade of husbandry, and not of gentleman; or where a peer, who has more than one name or dignity, is not named (h) by the most noble; or where a gentleman or gentlewoman (i) is named spinster; or (k) a yeoman is named a gentleman; or (l) if there be no such town, parish, nor hamlet, nor place known out of a town, as that whereof either the appellant or appellee are said to be, and the appellee before (m) imparlance plead such matter in abatement, and thereon issue be joined and found for him, the writ ought to be abated. And it seems (n) also to have been holden, that if the appellant, after imparlance, confesses that he hath brought his appeal by a wrong name, the writ shall be abated: But it is said (o) to be no fault to give an esquire the addition of gentleman, *et sic è converso*. Also if one (p) who is usually known and called by the surname of B. be so named in the appeal, and the appellee plead that his name is C. and not B. and the appellant reply that the appellee is, and at the time of the purchase of the original was, as well known by the name of B. as by the name of C. and this be confessed and found for him, it avoids the plea of the *misnomer*. And if one who had his usual abode at B. and hath been some time seen at C. be named of C. in an appeal, it hath been questioned (q) whether this be such a fault as will abate the writ, because sometimes appellees may not have any known dwelling; but if that happen to be the case, surely it is the safest to reply it, and then there seems to be little doubt but it may make good the naming of the party of any place wherein he has at any time been. And if a place where he dwells, and is a house-keeper, and also another place where he keeps his wife and family be well known, it seems that the writ may name him of either of such places, or perhaps of both of them, but is abateable unless it name him of one of them.

(a) Finch 363.
364.
(b) 9. H. 5. 1.
(c) Sum. 243.
Rast. Ent. 49.
51. 54.
(d) 9. H. 5. 1.
(e) B. App. 44.
Rastal 108.
11. H. 6. 11.
35. H. 6. 55.
10. Ed. 4. 12.
2. Inst. 667,
668.
(f) 2. Inst.
668.
6. Coke 67.
(g) 14. H. 6. 15.
2. Inst. 668,
669.
(h) 2. Inst. 669.
(i) 2. Inst. 668.
(k) 5. H. 7. 16.
10. Ed. 4. 16.
Rastal 108.
Theol. 1. 11.
c. 4. f. 19.
(l) 3. Mod.
267.
Salkeld 59.
(m) Finch 434.
21. Ed. 4. 7. 2.
(n) 9. H. 5. 1.
B. App. 38.
(o) B. Add. 44.
(p) Rast. Ent.
50. 54.
(q) 1. Sid. 325.
Vide 10. Ed.
4. 13.
4. H. 6. 4.

As to THE THIRD POINT, *viz.* Where a writ of appeal may be abated, by the exception or plea of the party, for a defect in the addition of the appellant or appellee.

(a) 2. Inst. 665, 666. *Sect.* 104. It seems that the common law in no case (a) requires any other description of an appellant or appellee, but by their name of baptism and surname, unless they be of the degree of a knight, (b) or of some higher dignity; in which cases, whether the name or dignity be ancient, or (as some say) (c) of a new creation, as that of baronet, &c. it ought to be added to the name of baptism and surname; and if it be of the degree of nobility, it ought (d) to supply the place of the surname. And it seems that the law was (e) so curious in this particular, that if a plaintiff, in any action, gained a new name of dignity hanging a writ, he made it abateable; but this inconvenience is remedied by 1. Edw. 6. c. 7. f. 3. by which it is enacted, "that if any plaintiff in any manner of action shall be made a duke, archbishop, marquis, earl, viscount, baron, bishop, knight justice of either bench, or serjeant at law, depending the same action, that such action for such cause shall not be abateable or abated." But it hath been holden (f) that the dignity of a baronet is not within this statute, because there was no such dignity at the time of the making of it.

(a) 1. Sid. 40. 2. Inst. 666, 667. 11. H. 4. 40. 11. H. 6. 11. 10. Ed. 4. 16. (b) 11. H. 4. 40. 11. H. 6. 14. (c) Hob. 129. 2. R. Ab. 469. 2. Inst. 666, 667. Con. Lat. 169. (d) Sup. f. 101. (e) 32. H. 6. 29. 1. Edw. 6. c. 7. f. 3. Con. 24. E. 3. 25, 26. 28. Ed. 3. 53. (f) 1. Sid. 40. Lit. Rep. 81. C. Car. 104.

(g) 26. E. 4. 72. 2. Inst. 670. 2. Hale 176, 177. *Sect.* 105. To prevent (g) the inconvenience of troubling one person for another, which cannot but often happen if there be no other additional description of the defendant, it is enacted by 1. Hen. 5. c. 5. "That in every original writ of actions personal, appeals, and indictments, and in which the *exigent* shall be awarded, to the names of the defendants in such writs original, appeals, and indictments, additions shall be made for their estate or degree, or mystery, and of the towns or hamlets, or places and counties of the which they were or be, or in which they be or were conversant. And if by process upon the said original writs, appeals, or indictments, in the which the said additions be omitted, any outlawries be pronounced, that they be void, frustrate, and holden for none. And that before the outlawries pronounced, the said writs and indictments shall be abated by the exception of the party wherein the said additions be omitted."

For the better explication of this statute, so far as it relates to the subject of this treatise, I shall first premise,

ScH. 106. That (a) generally such additions in *English* (a) 1. Sid. 101.
are as good as in *Latin*; and where there are several defen- 1. Kcble 12.
dants of different names, and the same addition, it is (b) (b) B. Add. 3.
safest to repeat the addition after each of their names, ap-
plying it particularly to every one of them; and where a
father hath the same name and the same addition with a
defendant being his son, the writ is (c) abateable unless it (c) 37. H. 6.
add the addition of *puisne* to the other additions; but where 29.
the father is the defendant, it is said that there is no need 39. H. 6. 46.
of the addition of *eigne*. (d) And if the son be in *custodiâ* 4. Ed. 3. 31.
marescalli, and so declared against, it is said that the count (d) Salkeld 7.
is good without the addition of *puisne*, unless the father
of the same name and addition be also in the custody of
the marshal.

And for the better understanding of the nature of the
several additions required by the statute abovementioned, I
shall endeavour to shew,

1. What is a sufficient addition of the estate or degree.
2. What is a sufficient addition of the mystery.
3. What of the town, hamlet, place, or county, of the
appellee.
4. How the defect of an addition may be salved.

As to the first particular, *viz.* What is a sufficient ad-
dition of the estate or degree of the appellee, I shall ob-
serve,

ScH. 107. FIRST, That it is necessary to shew the pre-
sent estate or degree of the appellee (c) at the time of the (c) 9. Ed. 4. 2.
writ; in which respect this addition, and also the addition 22. Ed. 4. 13.
of the mystery differs from that of the place, which is 21. H. 6. 3.
sufficiently set forth by naming the appellee late of such a 2. Inst. 670.
place.

ScH. 108. SECONDLY, That such addition must be ex-
pressed in such a manner that it may plainly appear to refer
to the appellee; for it hath been resolved, that to name the
appellee "son of *A. B.* butcher," is insufficient, because
"butcher" refers to *A.* rather than to the appellee.

ScH. 109. THIRDLY, That (f) a bishop of an Irish (f) See Thelo.
diocese may be as well described by the addition of his l. 6. c. 13. f. 2.
Z 4 bishop-

- bishoprick, as an English bishop may by the addition of an English one (as it seems to be admitted in *the Year Book* of 21. Hen. 6. 3. pl. 4.): But it seems (a) clear, that no one can be well described by the addition of a temporal dignity in Ireland or any other nation besides our own, because no such dignity can give a man a higher title here than that of *squire* (3).

(3) See Mary Graham's case, referred to the twelve Judges in July 1791. Cases in Crown Law, 2d edit. page 444. See also Salk. 451, and the case of Gooders and Mahoney, 6. St. Trials, 855.

- (b) Thelwall. 6. c. 15. f. 12. *Sett.* 110. FOURTHLY, That the degree of a *serjeant* (b) at law is a good addition; from whence it may reasonably be argued that a degree in either university is also a good addition, as it is holden by *Sir Edward Coke* (c) without question; yet this is made a *quære* by *Thelwall* (d); and it is holden in *the Year Book* of 35. Hen. 6. pl. 55. and admitted by *Sir Edward Coke* in the very place above cited, that a *doctor in divinity* may have the addition of "*clerk*," which seems not easily reconcileable with the opinion that the degree of a *doctor* is a good addition; for if it were, why should not the writ be abateable for having the addition of "*clerk*" instead of it, contrary to the allowed rule (e) in other cases, that the most worthy addition is to be used?
- (c) Vide sup. f. 102.

- (f) 2. Inst. 667, 668. *Sett.* 111. FIFTHLY, That "*gentilium*" (f) or "*armiger*" (g) are, either of them, good additions for the estate and degree of a man; "*generosa*" (h) for that of a woman; and "*yeoman*" (i) and "*labourer*" (k) are also good additions for the estate and degree of a man, but not for that of a woman; and *widow* (l) or *single* (m) woman, or, as some (n) say, "*wife of J. S.*" are all of them good additions of the estate and degree of a woman, but no such like addition is good for the estate and degree of a man. And "*spinster*" (o) is a good addition for the estate and degree of a woman, and perhaps also for that of a man.
- (l) F. Add. c. 64. 66. Thelwall 1. 6. c. 14. f. 4. (m) F. Addition 5. 14. Fd. 4. 7. B. Add. 64. 66. Thelwall 1. 6. c. 15. f. 2. (n) 1. li. 4. 5. H. 6. 4. Qu. Cro. E. 193. Dyer 47. (o) Dyer 46, 47. 88. 1. Siderfin 247.

- (p) 2. Inst. 668. *Sett.* 112. SIXTHLY, That "*burgess*" (p) and "*citizen*," and "*servant*," (q) are all of them too general, and therefore not good additions of the state or degree either of man or woman.
- (q) 2. Inst. 668. B. Add. 42. 50. 55. 56. Con. 5.

As to the second particular, *viz.* What is a sufficient addition of the mystery of an appellee.

- (r) 2. Inst. 668. *Sett.* 113. Having first premised that the word "*mystery*" (r) includes all lawful arts, trades and occupations; and (s) that
- (s) B. Add. 44.

that if one under the degree of a gentleman have divers of such arts, trades, or occupations, he may be named by any of them; I shall endeavour to shew,

1. What additions of this kind are clearly good,
2. What are clearly insufficient.
3. What are questionable,

SECT. 114. AND FIRST, The following additions of this kind clearly seem to be good, as "husbandman, (*a*)" "merchant, (*b*)" "broker, (*c*)" "taylor, (*d*)" "point maker, (*e*)" "smith, (*f*)" "miller, (*g*)" "carpenter, (*h*)" "cook, (*i*)" "brewer, (*k*)" "baker, (*l*)" "butcher, (*m*)" "parish clerk, (*n*)" "mercier, (*o*)" "fishmonger, (*p*)" "dyer, (*q*)" "schoolmaster, (*r*)" "scrivener," and such like.

(*a*) 7. H. 6. 1. (*f*) 21. H. 6. 54. 22. H. 6. 53. (*g*) B. Add. 39. 51. (*b*) B. Add. 15. 22. 39. (*i*) 14. H. 6. 15. Thelolal 1. 6. c. 15. f. 6. (*k*) F. Urlog. 32. 37. 5. H. 5. 7. (*l*) 6. Ed. 4. 5. (*m*) B. Add. 42. (*n*) B. Add. 52. 62. (*o*) 2. Inst. 668, (*p*) 19. H. 6. 51. (*q*) 5. H. 5. 7. (*r*) 2. Leon. 186.

SECT. 115. SECONDLY, The following additions of this kind clearly seem to be insufficient, as "maintainer," "extortioner, (*t*)" "thief, (*u*)" "vagabond, (*x*)" "heretic, (*y*)" "common informer," and such like.

(*s*) 9. H. 6. 65. (*t*) 2. Inst. 668. (*u*) 22. Ed. 4. 1. 2. Inst. 668. (*x*) 9. H. 6. 65. (*y*) 22. Ed. 4. 1. 2. Inst. 668. (*x*) 22. Ed. 4. 1. (*y*) 1. Roll. 190.

SECT. 116. THIRDLY, The following additions of this kind seem to be questionable; as, "farmer," which by the better (*z*) opinion seems to be an insufficient addition, because if any mystery be implied in the notion of it, it is that of husbandry, of which "husbandman" is the proper addition.

(*z*) Thelolal b. 6. c. 15. f. 9. 2. Inst. 668. B. Add. 10. 28. H. 6. 4.

SECT. 117. FOURTHLY, "Chamberlain," "butler," and "pantler," are holden (*aa*) to be insufficient additions, because they denote only a special kind of officer, or servant, and imply nothing, which in the common understanding of the words comes under the notion of mystery. And from this ground it seems to follow, that neither "groom" nor "page" are good additions; and yet in some of the old books they seem to have been so admitted.

(*aa*) B. Add. 50. 58. 2. Inst. 668. Thelolal b. 6. c. 15. f. 10. 2. Inst. 668. (*bb*) B. Add. 50. 58. F. Corone 43. 21. Ed. 4. 71.

SECT. 118. FIFTHLY, "Hosteler" hath been holden (*dd*) to be a good addition, and seems properly enough to come under the notion of a mystery. And though it hath been resolved, (*cc*) that any one who keeps an inn may be sued by the addition of "a labourer," upon the custom of the realm for want of due care of the goods of his guests; because

(*dd*) B. Add. 35. 21. H. 6. 50. (*cc*) 22. H. 6. 21. Thelolal b. 6. c. 5.

because whoever keeps a common inn, is in that respect liable to answer for such defects, by whatsoever addition he may be styled, yet this does by no means prove that such person may not as well be sued by the addition of "hosteler," but only that he may be sued as well under any other addition.

As to the third particular, *viz.* What is a good addition of the town, hamlet, place, or county of the appellee; I shall observe,

SECT. 119. FIRST, That it is a good addition of this kind to name the appellee late (a) of such a town, in which respect this addition differs from that of the estate degree or mystery. And it is said, that if a defendant be named of *A.* and late of *B.* it is sufficient to prove either addition.

(a) Vide sup. l. 107.
21. Ed. 4. 15.
19. H. 6. 66.
1. Ed. 4. 1.
1. Ed. 4. 2.
Dyer 213. 9. H. 6. 66. Thelob. 6. c. 14. f. 17.

SECT. 120. SECONDLY, That the constant course of precedents hath made it a sufficient addition of this kind, to name the defendant of a city which is a county (b) of itself, as "*de Londino*," (c) "*de Norwico, &c.*" without more; by which it shall be intended that he lives in the county as well as city of *London* and *Norwich, &c.* unless he shew the contrary, though part of each of these cities lie out of their counties. However, it is certain, that it is not sufficient to name a defendant *Londini* (d) or *Bristolie, &c.* because that imports only that he belongs to such town, and not that he resides there. Also it seems clear, (e) that it is not sufficient to name a defendant of any town which is not a county of itself, without shewing in what county it lies. Also if (f) a man be named of a parish which contains more towns, or hamlets, or places known out of any town or hamlet, the defendant may plead such matter in abatement, because such an addition does not pursue the statute; but a parish shall be intended to contain no more than one town, unless the contrary be shewn.

(b) 2. Inst. 659.
(c) 4. Ed. 4. 16.
21. Ed. 4. 15.
27. H. 6. 4.
35. H. 6. 12.
(d) 35. H. 6. 12.
7. H. 6. 1.
4. Ed. 4. 10.
(e) C. Jac. 167.
(f) 2. Inst. 669.
Vide sup. f. 92.
103.
Thelob. 6. c. 14. f. 20.
35. H. 6. 30.

SECT. 121. THIRDLY, That if there be two towns in a county of the same principal name, with different additions to distinguish them from one another, as *Great Dale* and *Little Dale*, or *Upper Dale* and *Lower Dale*, and the defendant be named only of the principal town without any addition as of *Dale* only, the defendant may plead (g) that there are two *Dales* in the same county called *Great Dale* and *Little Dale*, and none without an addition, &c. Or according to some opinions (h) either in this case where there are two different towns called *Dale*, or even where there is but one town, sometimes called *Southdale*, and sometimes *Northdale*, but never simply *Dale* without an addition,

(g) 7. H. 6. 39.
19. H. 6. 35.
8. H. 5. 8.
21. Ed. 4. 51.
10. H. 7. 4.
10. H. 6. 5.
Rastal 47.
(h) 3. H. 6. 8.
14. H. 6. 23.
Thelob. 1. 6.
c. 3. 14. 23.
Con. 7. H. 6. 45.

the

the defendant may plead that there is no such town as *Dale* in the same county, because parcel of a name cannot be said to be the name. But if there be two towns of the same name in a county without any addition to distinguish them, as it sometimes happens where they lie at a distance from one another, I do not find any authority that it is not sufficient in such case to name the defendant generally of either of such towns, without adding any thing to distinguish it from the other.

Sett. 122. FOURTHLY, That if an appellee live in the hamlet of a town, it is said (a) to be in the election of the appellant to name him either of the hamlet or of the town; but it seems that this is to be intended only of such hamlets which are so far esteemed to be parts of a town, that those who live in them are, in common speech, indifferently styled sometimes of the hamlet, and sometimes of the town; for I see not how the addition of the town can be proper, where the party lives in a place known by a distinct name, and not parcel of it.

(a) Theolod
1. 6. c. 14. f. 14.
2. Inst. 669.
35. H. 6. 30.
14. H. 6. 23.
2. Inst. 6. 669.

Sett. 123. FIFTHLY, That if an (b) appellee live in the place known by a special name, and lying out of any town or hamlet, he may be well named of such a place; but if he live in any place known within a town or hamlet, it is said to be safest to name him of the town or hamlet.

(b) 2. Inst. 669.
21. Ed. 4. 37.
F. Brief 467.

Sett. 124. SIXTHLY, That the addition of the place of habitation of a wife is sufficiently shewn, by shewing that of the husband, because it shall be intended that the wife lives where the husband does.

2. Inst. 667.
3. H. 6. 31.
2. Theolod b. 6.
c. 14. f. 6, 7. 9.

As to the fourth particular, *viz.* How the defect of an addition may be salved.

Sett. 125. It hath been adjudged, (c) that if an appellee, named with an insufficient addition, or without any, appear and plead to the appeal, he cannot afterwards take advantage of the defect of the addition, because by his appearance and plea he admits himself to be the person intended. And some have holden, (d) that the party by his bare appearance salves the want of an addition, or a bad one; but this seems contrary to almost all the authorities above cited in relation to this matter, which seem to admit that the party, before other matter pleaded, may take advantage either of the want of an addition or of a bad one. And accordingly it was lately (e) adjudged in an appeal of death between *Reeve and Trundal*, that the want of an addition of the appellee was a good plea in abatement, and the writ of appeal was abated by such plea.

(c) 35. H. 6. 12.
B. Error 69.
C. Jac. 610.
2. Roll. 225.
1. R. Abr. 780.
2. Inst. 670.
7. H. 6. 39.
seems con.
(d) 1. Sid. 447.
1. Keble 885.
(e) Pasch. 3.
Geo. 1.
1. Stra. 402.
S. C. Comy.
As Rep. 257.

As to the FOURTH POINT above mentioned, viz. Where a writ of appeal may be abated upon the exception or plea of the party for the multiplicity of action.

- (a) S.P.C. 82. *Sett.* 126. It seems (a) clear, that after an appellant hath appeared on a writ of appeal, or even on a bill of appeal removed into the court of king's bench from before the sheriff and coroners by *certiorari*, if he commence a new appeal for the same matter, the appellee may plead in abatement that such prior appeal is still depending, &c. But it seems (b) clear, that it is no plea in abatement of a writ of appeal, that the appellant hath brought a bill of appeal for the same matter before the sheriff and coroners, because such bill is not of so high a nature as a writ of appeal, but it is said to be only in nature of a *plaint* till it be removed into the king's bench, which seems (c) to depend on the statute of MAGNA CHARTA 17. since which statute the sheriff and coroner cannot proceed to trial upon a bill of appeal, as perhaps they might have done by the common law. But after such bill of appeal before the sheriff and coroners is removed into the king's bench, if the plaintiff bring a writ of appeal for the same matter, it is holden (d) by *Staundford*, and seems to be admitted in the *Tear Book* of 4. *Hen. 6. pl. 14, 15.* and both by *Fitzherbert* (e), and *Brook* (f) in their Abridgments of the said *Tear Book*, that the appellee may plead in abatement that such bill of appeal is depending, because after it is removed into the king's bench, it is of as high a nature as a writ of appeal. Yet *Sir Matthew Hale* (g) seems to be of opinion, that such bill so removed is not pleadable in abatement till the plaintiff hath appeared thereon; perhaps for this reason, that before the plaintiff hath appeared, it doth not appear of record, that he hath prosecuted the suit in the king's court, because the *certiorari* might have been taken out by a stranger. Upon which ground it seems to have been resolved, (b) that it is no good plea in abatement of an appeal, that the plaintiff hath purchased another writ of appeal returnable at such a day, &c. and that such writ was delivered of record to the sheriff, because it might be, for what appears upon the record, that the first appeal was so far prosecuted by a stranger; but in the same case it is admitted that such prior appeal depending will abate the second, where it appears on record that the same plaintiff hath appeared and sued it, as in praying of process, &c.
- (a) S.P.C. 82. Summary 189.
B. Brief 192.
C. Eliz. 695.
F. Brief 548.
774
- (b) 10. II. 4. 4.
S. P. C. 82.
F. Cor. 269.
465.
Sec 4. Ed. 3. 9.
- (c) Sup. c. 9.
f. 39, 40, 41.
- (d) S.P.C. 82.
- (e) F. Cor. 4.
(f) B. App. 44.
- (g) Sum. 189.
- (b) 7. H. 7. 6.
F. Brief 192.
B. App. 87.
S. P. C. 82.
2. Hale 149.

As to THE FIFTH POINT, viz. Where a writ of appeal may be abated for the making of *J. S.* the defendant, where there is no such person.

Sett. 127. It seems clear, that if there be divers defendants in an appeal, and one of them who does not appear be

be misnamed either as to the surname, or name of baptism, or be described by a wrong addition, or were dead before the writ purchased, any of the defendants who do appear may plead, "that whereas the appeal is sued out against *A. B.* of *C.* in the county of *D.* yeoman, there was not at the time of the purchase of the writ, nor hath been since, any such person as *A. B.* in *rerum naturâ*, as by the writ is supposed: (a)" whereon if issue be joined, if the appellant cannot prove that there now is, or was at the time when the writ was purchased, such a person of such name and addition as by the writ are supposed, it seems that the verdict ought to go against him, whereupon the writ shall be abated as to all the defendants. But it is not (b) advicable in such a case to plead that there was not at the time of the purchase of the writ, &c. any such person as *A. B.* of *C.* in the county of *D.* yeoman, because it implies a *negative pregnant*. Also if a defendant, misnamed or described by a wrong addition, do appear, it seems to be agreed (c) that no other defendant besides himself can plead the misnomer or wrong addition. But I do not find it to be agreed, (d) that such a plea by one defendant shall abate the writ as to any other besides himself; but if such matter, when pleaded by another on the non-appearance of the defendant, will abate the writ as to all, it seems difficult to give a reason why it should not have the like effect when pleaded by the party himself.

As to THE SIXTH POINT, *viz.* Whether the appellee may have more than one such plea or exception.

Sec. 128. There seems to be no doubt but that if a defendant in an appeal, or even in an indictment of felony, think it proper to make use of never so many pleas or exceptions of this kind, requiring all of them the same kind of trial, he may take advantage of them all, (e) unless (f) they be repugnant to one another. Also it seems to be the better opinion, (g) that he shall have the like advantage, where such pleas or exceptions do not all of them require the same kind of trial, but some of them are triable by matter of record, and others by the country. And if such pleas or exceptions be all of them triable by the country, it seems to have (h) been generally agreed, that the defendant must at the same time plead also with them all his matters in bar, if he have any such, and also plead over to the felony (unless where he hath admitted the fact by the matter pleaded in bar): But if the plea in abatement be triable by matter of record, it is holden in some books, (i) that the defendant is not bound to plead over to the felony, till such plea in abate-

ment

(a) Dyer 348.
Summary 189.
S. P. C. 82.
Raft. 49. 52.
F. Cor. 15. 43.
64.
26. H. 6. 6.
21. H. 7. 34.
7. H. 4. 27.

(b) B. App.
111.
6. H. 7. 7.
21. E. 4. 71, 72.
(c) S. P. C. 82.
See the books
above cited.
(d) 21. H. 7.
31.
5. Ed. 4. 3.
7. H. 4. 27.
S. P. C. 82.

(e) Finch 363.
364. 385.
4. H. 6. 15, 16.
B. Appeal 44.
(f) S. P. C. 82.
(g) Finch 364.
Qu. 4. H. 6. 16.
B. App. 44.
(h) Finch 363.
364. 385.
21. Ed. 4. 71.
Reeves v.
Trundal, Pasc.
3. Geo. 1.
Dyer 88.
Raftal 49.
3. Mod. 266,
267.
Qu. 6. H. 7. 7.
Shower 47.
(i) B. App.
48. 66.
1. H. 6. 1.
27. Affize 3.

(a) C. Eliz. 695. 10. H. 4. 4. 4. H. 6. 15. 1. H. 6. Rastal 47. (b) Finch 363. 364. 385. 27. Affize 3. 1. H. 6. 1. 2. Hale 239. (c) C. Eliz. 495. Pop. 115. Owen 59. 60. Moor 457. Noy 36. (d) Finch 385. 418. 40. Ed. 3. 29. 39. Affize 13. (e) 1. Ed. 3. 11. Dyer 310. 4. H. 6. 16. 1. Jones 413. S. P. C. 82. C. Car. 520. Finch 363, 364. 385. (f) Finch 363. 385. (g) 40. Ed. 3. 29. Finch 363. 385. (b) Vide C. Eliz. 203. Dyer 228. Yelv. 36. (i) 1. Sid. 252. 1. Lev. 163. 1. Inst. 33. Yelv. 112. Aleyn 65, 66. (k) C. Eliz. 495. Owen 59. Noy 36. Moor 457. Pop. 115. Vide Thel. b. 15. c. 5.

(4) It seems from Carthew 56. that if the appellee plead in abatement, and doth not plead over to the felony, that the appellant ought to move the Court for judgment against the defendant. But in that particular case, the plea being accepted by the plaintiff, it was held good without pleading over.

And now I am in the third place to consider, what faults of this kind are *amendable*, which without such amendment would abate the writ.

Sec. 7. 129. It is to be observed, that appeals are expressly excepted out of 8. Hen. 6. c. 12. which is the principal *statute of amendments*: Also it seems (1) to be generally taken for granted, that no criminal prosecution whatsoever is within any other statute of amendments, or any of the *statutes of jeofails*; from whence it follows that no defect is amendable in an appeal, but such only as is amendable by the common law. And therefore it seems to be the better opinion, that no false (m) *Latin* in a writ or bill of appeal, nor omission of a word, (n) nor even of a letter, (o) nor other defect or variance (p) from the proper legal form, can be amended, because no such fault is amendable by the common law, without the consent (q) of the parties, except only in actions wherein the king (r) is a party. It seems indeed to be generally holden in some books, (s) that such faults in a writ are amendable where the curfitor varies from

(1) Vid. Salk. 51. 6. Modern 269. 1. Bulst. 142. 144. (m) 9. H. 7. 16. 1. Bulst. 142. 144. 4. H. 6. 16. B. Amend. 62. (n) F. Cor. 121. 13. Affize 10. (o) F. Amend. 68. (p) F. Vari. 59. 8. Coke 156. 4. H. 6. 16. (q) F. Amend. 63. (r) 8. Coke 156. 4. H. 6. 16. 40. Affize 26. (s) Moor 866. 1. Roll. 138. C. Eliz. 644. Qu. Hob. 128.

his instructions, in the names or (a) additions of the parties, or other like matters which he must take from his instructions. But what is said in such books in relation to this matter seems to be intended of such writs only as are within the purview of the statutes of amendments, and therefore cannot be applied to appeals; yet it seems that a misprision in the count is amendable by the common law, as well in an appeal as in any other action, before it is entered on the record; and so it seems that *the Year (b) Book of 7. Hen. 4. pl. 27.* is to be intended, in which a mistake in the declaration in laying the fact in an improper *visne*, was suffered to be amended. Also it seems that after the count is entered on the record, a variance in it from the writ, if a mere misprision, may be amended by it, as it seemed to be agreed in an appeal of death between *Smith and Bowden*, (c) wherein the word "*murdrum*" in the count on the record was adjudged to be amendable by the word *murdrum* in the Bill on the file.

(a) 1. Ven. 64, 49. 150. 151.
1. Sidney 412.
Hobart 118.
Hutton 56, 57.
C. Car. 74.
Littleton's Rep. 50.

(b) F. Cor. 30.

(c) Mich. 7, Annæ.
2. Ld. Ray. 1288.

As to THE FIFTH GENERAL POINT, *viz.* What may be pleaded in bar of an appeal.

Having already in the former part (d) of this chapter endeavoured to shew what may be pleaded in bar of an appeal of *mayhem*, and intending in the latter part of the book to consider the learning relating to pleas in bar of criminal prosecutions in general, I shall in this place only examine the nature of pleas in bar of appeals of felony in particular. And for that purpose having premised that, by the better opinion (e) at this day, no special plea in justification of the killing shall be admitted in an appeal of death, but that in every such case the general issue is to be pleaded; I shall consider,

(d) S. 22, 23, 24, 25, 26.

(e) See B. 1, c. 28. f. 3.

1. What pleas will be good bars of an appeal of felony, by shewing that the plaintiff had never any right to bring it.

2. Whether a *retraxit* or nonsuit in a former appeal of this kind will be a good bar of another.

3. Whether a discontinuance.

4. Whether an abatement of a former appeal.

5. Where the bringing of an appeal of this kind against one person shall be a bar of any subsequent appeal against any other person not named in the first appeal.

6. Where a release will be a good bar of an appeal of this kind.

7. Where

7. Where the appellant may be barred as to one appellee, and continue his suit against the rest.

8. Whether any, and which of these pleas, are consistent with the general issue.

As to the first particular, *viz.* What pleas will be good bars of such an appeal by shewing that the plaintiff had never any right to bring it.

Sec. 130. It seems to be a good general (a) rule, that any plea of this kind is good which shews that the plaintiff wants any of those requisites which the law makes necessary to intitle him to the appeal. And therefore in an appeal of death by a woman it is a good plea, that (b) she was never lawfully married to the deceased; or (c) that she hath not continued a widow since his death, but hath taken another husband. Also in an appeal of death by one as heir, it is a good plea, that *A. B.* at the time (d) of the writ was and still is heir of the deceased; or (e) that one of the defendants was the wife of the deceased, and made a defendant by covin to exclude her from her appeal; or that the plaintiff is a bastard (f) and not legitimate. And where one brings an appeal as brother and heir, it is a good plea, that he is not a brother and heir, as by his writ and declaration he hath supposed, or (b) that he hath an elder brother by the same father and mother still alive; or where one brings an appeal as cousin and heir, *viz.* brother of *A. B.* father of the deceased, it is a good plea, that he is not cousin (i) and heir, *viz.* brother of *A. B.* father of the deceased, &c. as by his writ and declaration he hath supposed. Also (k) it is a good plea in any appeal of death, that the plaintiff hath spent his time in not bringing the appeal within the year and day after the death of the person supposed to have been killed. Also it is a good (l) plea in an appeal of robbery, that the plaintiff is a villein to the defendant. And it is a good (m) plea in an appeal of rape by a man and a woman, that the plaintiffs were never lawfully married. And (n) it is a good plea in bar of any appeal of felony, that the plaintiff is an idiot, or that he was born deaf and dumb. Also it is said by *Sir William Staundford*, (o) that it is a good plea in bar of any such appeal, that the plaintiff is attainted of treason or felony; however (p) it seems that such attainder is no perpetual bar, but only during the time it continues in force.

As to the second particular, *viz.* Where a *retraxit* or *nonfuit* in a former appeal of this kind will be good bars of another appeal.

Sec. 131. I take it to be clear, (a) that a *retraxit* of any such appeal is a bar of all subsequent appeals of the same kind; for it seems to be a general settled rule, that a *retraxit* of any action whatsoever is a bar of all others of the like or inferior nature. Also it seems to be certain, that a *nonfuit* on a bill (b) of appeal, whether commenced in the court of king's bench, or before justices (c) of gaol-delivery, or before the sheriff (d) or coroners, or a nonfuit after (e) declaration on a writ of appeal, is a bar of all other appeals of the same kind; because no such bill or declaration shall be received, unless (f) the appellant have first appeared in proper person; and it seems to be agreed by all the books, that a nonsuit after such an appearance is peremptory. Also it is holden generally in some books, (g) that a nonsuit after appearance is a peremptory bar to the appellant, without adding that he must also have declared. From whence, and also from the general reason of the thing, it may be reasonably argued, that if it any way appear on record that the appellant who was nonsuited in a former appeal, did actually appear and prosecute such appeal, as by paying (h) of process on it, &c. he shall be barred in any other appeal of the same kind. But it seems (i) that the bare taking out of a writ of appeal, and causing it to be delivered of record to the sheriff, and a nonsuit upon it, is no bar of a second appeal, because it doth not appear of record but that it might be done by a stranger. And notwithstanding some books (k) seem to hold generally, that any nonsuit in appeal is peremptory, yet it seems to be in a great measure settled (l) at this day, that such nonsuit ought to be after an appearance in proper person of record.

(a) 1. Inst. 138, 139. Summary 190. 80 Coke 58.62.
(b) S. P. C. 148.
(c) 10. H. 4. 4.
(d) S. P. C. 148.
(e) 22. Affize 97.
(f) Sum. 190. S. P. C. 148. C. Eliz. 605.
(g) Salkeld 64. Vide F. N. B. 6.
(h) 22. Affize 97.
(i) 47. Ed. 3. 16. B. App. 28. 71.
(j) F. Cor. 184.
(k) 1. Inst. 139. Vide 4. H. 6. 16. Supra f. 16. 9. H. 4. 2. 3. 47. Affize 7.
(l) Vide 7. H. 7. 6. 1. Sid. 32. (k) 27. Affize 7. C. Eliz. 605.

Vide 4. H. 6. 16. 1. Sid. 32. (l) See the books cited to the other points of this section.

As to the third particular, *viz.* Whether a *discontinuance* of a former appeal of this kind will be a good bar of another appeal.

Sec. 132. It is holden (m) by the reporter of the Year Book of 16. Edw. 4. that a discontinuance of one appeal is a bar of any other, because the life of the appellee was once put in jeopardy by the first appeal; but this reason proves as strongly that the abatement of an appeal where the writ is good shall be a bar of another; for by an appeal so

(m) 16. E. 4. 11. B. Appeal 103. S. P. C. 59.

(a) 1. Bulst.
141.
C. Jac. 183,
284.
Yel. 204.

abated the life of the appellee is as much put in jeopardy as by an appeal that is discontinued; and yet it seems to be agreed at this day, that such an abatement of an appeal cannot regularly be a bar of another, as shall be more fully shewn in the next section. Nor can I find it any where adjudged, that the discontinuance of one appeal is a bar of another. It is true indeed, that in the case of *Bradley (a) v. Banks*, the appellee was totally discharged upon a discontinuance. But the reason hereof seems to have been, not that the discontinuance would be of itself a bar to any other appeal, but because the year and day were passed, and consequently there could be no other appeal; and the appellee had also been before convicted on an indictment, and had his clergy, and consequently could not be proceeded against at the suit of the king. However, granting the opinion afore-mentioned to be law, that the discontinuance of one appeal shall be a good bar of any other, surely it is to be intended of such a discontinuance only, as happens after the appearance of the appellant, for the reasons given in the precedent section in relation to a nonsuit.

As to the fourth particular, *viz.* Whether an abatement of a former appeal of this kind will be a good bar of another appeal.

Sec. 133. It seems clear, that if an appeal by a wife (b) Vide S. P. abate by her taking another husband, or an appeal by an C. 147. heir abate by his death, there can be no (b) other appeal. Summary 200. But the reason hereof seems not so much to depend on the (c) Sup. sect. abatement, as on the marriage in the first case, and the 32, 39. 41. death in the second; which, as it seems the better (c) opinion, would of themselves have abated a subsequent appeal, whether any had been brought before or not. Yet I find it (d) 6. H. 4. 6. holden generally in some (d) of the old books, that an ap- B. Appeal 10. peal once determined cannot revive; and in (e) others, (e) 50. Ed. 3. 1. that where an appeal of *mayhem*, which in this respect B. Appeal 16. seems not to differ from other appeals, is abated without the default of the party, he may have a new one; by which it seems to be implied, that if it abated by his default he cannot have a new one; and this opinion seems also to be confirmed by some other (f) old books, but it is denied (g) by others. However, I take it to be settled (b) at this day, (g) B. Appeal 53. 118. 146. where there continues to be a plaintiff not disabled to pro- 15. 118. 146. secute, he shall not be barred in a second appeal by an abate- (b) Sup. f. 4. ment of the first.

As to the fifth particular, *viz.* Where the bringing of an appeal of this kind against one person will be a bar of any subsequent appeal against any other person not named in the first.

Sec. 134. It is said, (a) that anciently one might have (a) S. P. C. 65. had two appeals for the same fact, one against the principal, the other against the accessory. And even at this day, if one be robbed of the same goods at several times, or receive different (b) maims, whether at the same or at several times; (b) 9. H. 4. 2. or a woman be ravished more than once, whether by the 11. H. 4. 14. same or by different persons; it seems clear that several appeals lie for each distinct offence. But it seems to be generally (c) agreed at this day, that after one hath brought an appeal of felony against one person, who is thereon attainted and hanged; he may be barred by it in any subsequent appeal, for the very same crime, against any other person not named in the first, whether such subsequent appeal, against the person so omitted in the first, be brought against him as principal, or accessory (d) before the fact, or (d) Sum. 190. even as accessory after the fact, unless where he happens to be so accessory after the first appeal was commenced; in which case it is certain that he is liable to such second (e) appeal, because it was impossible to charge him in the first. But otherwise after an attainder had on the first appeal, the law seems to disallow the bringing of a second; for this reason, that where an appellant has so far had his revenge in one appeal he shall not be indulged in the bringing of another, which his own laches only made necessary. (e) B. App. 32. 11. H. 4. 13. 14. (f) Sum. 190. S. P. C. 65. 98. B. App. 14. 28. 4. Co. 47. Sup. 6. sect. 5. (g) Keilw. 83. ryasto appeals of robbery.

Also it seems to be (f) clear, that if one bring an appeal of felony against another, who is either acquitted by verdict, or otherwise finally discharged by any other matter, which will peremptorily bar any other appeal against him by the same appellant for the same fact, the appellant may also be barred in any other appeal for the same fact against any (g) other person whatsoever; perhaps for this reason, that he who appears to have brought an ill-grounded action of so high a nature, or to have so far made default in the prosecution of such an action, as to be for ever barred from bringing another against the same defendant, shall not be thought worthy to bring another against any other person whatsoever. (f) 28. Edw. 3. 90. 26. Affize 42. Keilw. 83. 4. Co. 44. 48. (g) 47. Ed. 3. 16. F. Cor. 104. 9. H. 4. 2. Summary 188. 190. S. P. C. 98. 47. Affize 7.

But I cannot be satisfied with the reason which some of the books seem to give why all the defendants must be named in one appeal; which is this, that the statute of

MAGNA CHARTA, c. 34. by which it is provided, "That none shall be imprisoned upon the appeal of a woman, for the death of any other than her own husband," speaks only of appeal in the singular number; from whence it is said to be collected, that all the defendants must be named in one appeal. But by what kind of argument this collection is made, I do not find; nor do I see why twenty appeals brought by the same woman, if the law would permit so many, are not as much within the letter and meaning of the statute as one appeal. And where the law does permit the bringing of a second appeal against the same person, as it is clear that in some cases it does, it may reasonably be argued, that he may as well bring it against others also; as (a) where the first is abated, and there still continues to be a plaintiff not disabled to prosecute, (b) and in some other cases: For if an appellant be not barred by the abatement of his first appeal, from bringing a second against those who had vexation by the first, and were legally discharged from it, why should he be barred by it, as to those who were not concerned in it?

(a) 28. Ed. 3. 90.
4. Coke 48.
(b) See the precedent section.

As to the sixth particular, *viz.* Where a release will be a good bar of an appeal of this kind.

(e) Litt. f. 500, 501. *Seft.* 135. It seems clear, that a release of "all manner of actions", or of all "actions (c) criminal", or of "all actions (d) mortal", or of "all actions concerning pleas of the crown", or of "all (e) appeals", or of "all (f) demands", will be a good bar of any such appeal. But it (g) seems that a release of "all actions personal" will not bar such an appeal, because that an appeal in which the appellee is to have judgment of death, is higher than an action personal, and not properly called an action personal. Also it seems (b) clear, that whatsoever the nature of the release may be, it shall not wholly discharge the appeal, unless it were made before it was commenced; for if it be subsequent to the appeal, it shall only discharge it as to the suit of the plaintiff, and after judgment given for such discharge, he shall be arraigned on the appeal at the king's suit, as shall be shewn more at large in the chapter of Indictments. Also it is (i) certain, that no release shall discharge a person attainted, without the king's pardon.

(e) Litt. f. 501.
(d) 1. Infl. 287, 288.
(e) Litt. f. 501.
(f) Litt. f. 508.
(g) Litt. f. 500, 501.
Con. F. Rel. 46.
Qu. B. App. 29.
21. Ed. 4. 72.
9. H. 4. 2.
Sup. sect. 25.
(b) F. Cor. 12.
S. P. C. 148.
Summary 200.
Rastal 43. 48.
(i) Sup. f. 38. 44.

As to the seventh particular, *viz.* Where the appellant may be barred as to one appellee, and continue his suit against the rest.

(k) Sum. 190. *Seft.* 136. It (k) seems, that if he be barred by release as to one, or by being vanquished in

21. Ed. 4. 72.
2. R. 3. 9.
B. Appeal 111.
120.

in battle by one, yet he may continue his suit against the rest, because he is to have a several execution against every one of them. Yet in an appeal against divers, whether they plead the same or several issues, it hath been adjudged, (*a*) that a nonsuit against one, at the trial of any one of the issues is a nonsuit as to all; of which this seems to be the best reason, that (*b*) such a nonsuit operates in nature of a release of the whole. But whether (*c*) the discontinuance of an appeal as to one appellee, shall have the like construction as to all, may deserve to be considered.

B. Dis. de Pro. 20. (*b*) Hob. 180. (*c*) Vide 7. H. 6. 27. 30. Affize 36. 38. Affize 17. 27. Edw. 3. 87.

As to the eighth particular, *viz.* Whether any, and which of the pleas abovementioned are consistent with the general issue.

Sett. 137. It seems agreed at this day, that if the defendant in an appeal of death, by a (*d*) wife, plead *ne unques accouple in loial matrimony*; (*c*) or in an appeal of death by one as heir, plead that the appellant is a bastard, (*f*) or that he hath an elder brother of the whole blood alive, or in (*g*) any appeal of death, plead that the person supposed to have been killed, was dead above a year before the purchase of the writ, or that (*h*) the appellant had formerly brought an appeal for the same fact against another person, who was thereon attainted and hanged, or generally (*i*) any other plea not amounting to an implied confession of the fact, as a release, &c. whether it be trial by matter (*k*) of record, or by *pais*, and whether it (*l*) deny that the appellant had ever any right to the appeal, or admit that he once had a right, but shew that he is now barred, he may, together with such plea in bar, plead also *not guilty* to the felony. And if such plea be triable by the common law, unless the appellant reply both to that, and also to the plea of *not guilty*, he discontinues the appeal; but (*m*) if it be not triable by the common law, the defendant need only to reply to it, and not to the felony, until after such plea has been tried. But it is holden in many books (*n*) of good authority, that a man shall not be admitted to plead a *release*, and the *general issue* also, because it is repugnant at the same time to insist that the crime is released, and (*o*) yet that there was no such crime committed to be released. But I do not find this point any where adjudged; and as to the argument abovementioned, from the repugnancy of

21. H. 6. 29. (*m*) C. Eliz. 223. 3. Leon. 268. (*n*) S. P. C. 68. Finch 385, 386 Summary 190, 191. Hob. 170, 171. (*o*) Hob. 270, 271.

the plea of *a release* to the general issue, it may be answered, that a man may reasonably take a release to free himself from trouble, from the suspicion of a crime of which he would by no means own himself guilty; and in appeals of death after a plea of (a) *autrefois convict* by verdict, and even after the plea of (b) *autrefois convict* by confession, and clergy thereon had, the general issue has been received; and yet such pleas as much imply a confession of the fact as the plea or release. And in *Smith's Case*, who was indicted of high treason in the beginning of his late majesty's reign, for the murder of *Colonel Parks*, after a plea of a pardon the general issue was received. However, I do not find it any where holden, that the plea of a release may not be pleaded, if the defendant think fit, without pleading the general issue.

(a) Finch 385. Also it seems questionable, (c) whether any other plea in bar, whether triable by matter of record, or by *pais*, may not also be received without pleading the general issue, as it seems clear, that in some cases it may; (d) as where it declines the jurisdiction of the Court, (e) or would be prejudicial to the defendant by infranchising the plaintiff, as where a villein brings an appeal of robbery against his lord, who pleads the villenage in bar, in which case he shall not be compelled to plead *not guilty*, because that would amount to an infranchisement of the plaintiff, by supposing that the fact, if committed, needs a defence; which it cannot do unless the plaintiff have a property, which, if he be a *villein*, he cannot have against his lord,

(f) 18. Ed. 3. 32. Also it seems clear, that (f) if any of the bars abovementioned, except that of a release, be suffered to be pleaded without the general issue, and be found against the defendant, they do not conclude him from pleading the general issue afterwards; and as to the plea of a release, whether that being pleaded without the general issue, and found against the defendant, do conclude him at this day to plead the general issue afterwards, may deserve to be

considered, for the reasons abovementioned. (g) But it seems, that if a *demurrer* to the Court be adjudged against an appellee, he shall not be admitted to plead either in bar, or the general issue, but shall be condemned, as shall be shewn more at large in the chapter of Demurrers.

(g) 14. Edw. 4. 7. 50. Ed. 3. 15. 16. 28. Ed. 3. 91. S. P. C. 98. F. Corone 419. 27. Affize 3. Con. 7. Edw. 4. 15. Keilw. 100. Summary 190. 243. Finch 385, 386. 14. Ed. 4. 7. Keilw. 100.

As to THE SIXTH GENERAL POINT, viz. Where the appellant shall render damages to the appellee for a false appeal.

SECT. 138. Having premised that by the common law a defendant may (a) recover damages for a false and malicious appeal, against the appellant and his abettors, by a writ of conspiracy or an action on the case, in the nature of such writ, as hath been more fully shewn in book the first, (b) I shall here endeavour to shew in what cases and in what manner he may, if he chuse rather so to proceed, recover such damages by the *statute of Westminster the second*, c. 12. which was made for his speedier remedy, and is enacted as followeth:

SECT. 139. "Forasmuch as many through malice intending to grieve others, do procure false appeals to be made, of homicides and other felonies, by appellors, having nothing to satisfy the king for their false appeal, nor to the parties appealed for their damages;" it is ordained, "That when any, being appealed of felony, surmised upon him, doth acquit himself in the king's court in due manner, either at the suit of the appellor or of our lord the king, the justices before whom the appeal shall be heard and determined, shall punish the appellor by a year's imprisonment: and the appellor shall nevertheless restore to the parties appealed their damages, according to the discretion of the justices, having respect to the imprisonment or arrestment that the party appealed hath sustained by reason of such appeals, and to the infamy that they have incurred by the imprisonment or otherwise; and shall nevertheless make a grievous fine unto the king. And if peradventure such appellor be not able to recompense the damages, it shall be inquired by whose abetment, by malice, the appeal was commenced, if the party appealed desire it. And if it be found by the same inquest, that any man is abettor through malice, he shall be distrained by a judicial writ at the suit of the party appealed to come before the justices. And if he be lawfully convicted of such malicious abetment, he shall be punished by imprisonment and restitution of damages, as before is said of the appellor."

And for the better understanding this statute, I shall endeavour to shew how the several parts of it have been expounded.

SECT. 140. AND FIRST, Whereas the words of the preamble are, "that many through malice procure false appeals

"peals to be made by appellors, having nothing, &c." and in the purview it is said, "that it shall be inquired, by whose abetment, by malice, the appeal was commenced, &c. and if it be found that any man is an abettor through malice, &c." in all which places the malice is expressly referred to the procurors and abettors only, and in no part of the statute to the appellant; it is holden by (a) some, that wherever an appellant is acquitted of an appeal of felony, he shall recover damages by force of this statute against the appellant, except only where he hath been indicted of the same felony before; and it must be confessed, that in the (b) *Reports* and *Entries* (c) relating to this matter, damages seem generally of course to have been awarded against the appellant, on the acquittal of the appellee in all other cases, without any finding that the appeal was malicious. Yet it is holden by (d) others, that the appellant is no more within the intent of the statute than his abettors, unless his appeal was grounded on malice. And if it be considered, that where the appellant is to render damages by force of the statute, he is also, by the express words of it to have a year's imprisonment, and to be grievously ransomed to the king; surely it cannot be imagined that the makers of the statute intended in any case to expose him to so severe a punishment for a legal prosecution, which he has reasonable evidence to induce him to commence, though it may not be sufficient to induce a jury to convict the defendant.

Neither do I see any reason why the bringing an appeal against one who hath been before indicted, by a sufficient indictment (e) of the very same (f) crime, which is agreed (g) not to be within the meaning of the statute, should be the only excepted case; especially considering that any other case, wherein the appellant plainly appears to proceed on a probable ground of suspicion, is within the reason given in many books (h) for the favour shewn to the appellant where the appellee has been indicted before; which is this, that the appellant had cause and evidence to pursue the appeal, and it appears to the Court that it was not merely founded on malice. And this is also one of the reasons given in the (i) books, why the appellant is not to render damages by the intent of the statute, where the appellee in an appeal of murder is found guilty of homicide *se defenso*. As to the general expressions of the books abovementioned, in which damages seem of course to be awarded against the appellant without any inquiry whether his appeal were malicious or not, it may be answered, that the books speak as generally in relation to the recovery of the

(a) Co. Lit. 139.
2. Inst. 384.
Vide Litt. f.
208.
22. Aff. 39.
26. H. 8. 3.
(b) See the books cited under this and the following sections.
(c) Rast. Ent. 56.
(d) S. P. C. 168.
See L. Quin. Ed. 4. 126.
40. Ed. 3. 42.

(e) 20. Edw. 4. 6.
2. Inst. 384.
(f) 26. H. 8. 3.
33. H. 6. 1.
40. Ed. 3. 42.
24.
14. H. 7. 2.
40. Aff. 18.
(g) 22. Aff. 39.
26. H. 8. 3.
33. H. 6. 1.
40. Ed. 3. 42.
14. H. 7. 2.
20. Ed. 6.
40. Aff. 18.
(h) Damages 67.
(i) 40. Ed. 3. 42.
14. H. 7. 2.
21. Aff. 77.
2. Inst. 384.

the damages against the abettors, and yet it seems (a) plain (a) 2. Inst. 384.
 from the whole purport of the statute, that they are not S. P. C. 168.
 within the purview of it, unless their abetment were Plowden 88.
 founded on malice. And some (b) seem to have gone so far as to hold, that the heir who abets his mother in seems con-
 bringing an appeal for the death of his father, can be in Vide Dyer 120.
 no case within the statute, by reason of such abetment, be- (b) F. Cham-
 cause nature and duty oblige him in such a case to abet his perty 10.
 mother. Plowden 88.
 2. Inst. 384.

But this reasoning, if strictly examined, seems to prove no more than this, that in such case the heir shall *primâ facie* be intended to have abetted the appellant rather out of duty than malice, and that therefore he shall not be taken to be within the purview of the statute, without very strong evidence of his malice. But surely it cannot be denied, that in some cases it may be notorious, that an heir abets such an appeal, not out of duty but malice; as where he himself, without the least probable ground of suspicion, is the first promoter of the prosecution; or where he causes it to be carried on by violent and unfair methods, not for the sake of justice but oppression; in which cases it seems harsh to say, that he is not as well within the meaning as letter of the statute.

SECT. 141. SECONDLY, In the construction of the words "homicides and other felonies," in the preamble of the statute, it hath (c) been adjudged that the purview of it extends (c) F. Cor. 275. 382.
 to a rape, which was made a felony by another (d) branch of Plowden 124.
 the same statute; and it is (e) holden, both by Coke and (d) Sup. sect. 59, 60.
 Staundford, that it in like manner extends to offences made (e) 2. Inst. 384.
 felonies by any subsequent statute. S. P. C. 198.

SECT. 142. THIRDLY, In the construction of these words, "When any being appealed of felony surmised upon him, doth acquit himself in the king's court in due manner, either at the suit of the appellor or of our lord the king;" it seems to have been generally agreed, that no acquittal is within the intention of the statute, (f) (f) S. P. C. 169.
 unless it be had on an appeal, (either at the suit of the party, or of the king, after a nonsuit of the party,) and be 2. Inst. 385.
 of such a nature as (g) finally to bar all other prosecutions 14. H. 7. 2.
 for the same felony, whether at the suit of the king, or of (g) S. P. C. 169.
 the same, or any other party. And therefore it seems clear, (h) 4. Co. 47.
 that no damages shall be recovered on the (h) abatement of S. P. C. 169.
 an appeal nor on the bare (i) nonsuit of the appellant, nor 9. H. 4. 2.
 where the appellant is barred either by a (k) demurrer, or Vide 9. H. 5. 1.
 (i) 2. Inst. 385. F. Confp. 21. But 33. H. 6. 1. F. Cor. 102. 48. Ed. 3. 22. seem
 doubtful. (k) 2. Inst. 385. F. Cor. 12. S. P. C. 369.

by

(a) 27. Aff. by a (a) plea, shewing that he is not intitled to the appeal, 25.
 2. Inst. 385. nor on any acquittal on an insufficient (b) original; be-
 S. P. C. 169. cause in all these cases the appellee is liable to another pro-
 (b) 4. Co. 45. secution for the same felony. And if a person appealed of
 47. murder, be found guilty (c) of homicide by a misadvent-
 F. Cor. 444. ure, or *se defendendo*, which will be a bar of any other pro-
 9. H. 5. 2. secution for the same killing, yet it hath been resolved that
 S. P. C. 169. he shall not recover damages, not (d) only because it appears
 (c) 22. Affize that the appeal was not groundless, but also because the ap-
 77. pellee is not totally acquitted.
 2. Inst. 385.
 S. P. C. 199.
 (d) Vide sup. sect. 138.

(e) 41. Aff. But it is (e) clear, that the appellee is intitled to his
 and 24. damages, where he is acquitted on an appeal at the suit of
 F. Cor. 275. the king, after a nonsuit of the plaintiff, where he van-
 381. quishes (f) the appellant in a trial by battle. Also if two
 Damages 77. be appealed, the one as principal and the other as accessary,
 (f) F. Cor. 98. and the jury being charged on the accessary as well as the
 (g) S. P. C. principal, do acquit the principal, it seems to be (g)
 168, 169. agreed, that the accessary shall recover damages by the in-
 2. Inst. 385. tent of the statute, without an express verdict concerning
 33. H. 6. 1. him, because he is impliedly acquitted by the acquittal of
 the principal; for it is impossible that there should be
 an accessary where there is no principal. And this rea-
 son seems to hold as strongly for the damages, where the
 accessary doth not appear on the trial or acquittal of the
 principal; because in such case the acquittal of the principal
 is as (h) much an acquittal of the accessary, as where he doth
 appear.

(i) 2. Inst. 385. But it is holden (i) by *Sir Edward Coke*, that such an
 (k) S. P. C. 168. accessary shall not recover damages, because no jury can
 Vide 41. Aff. be returned to assess them; and *Sir William Staundford*
 24. (k) seems to be of opinion, that such an accessary shall not
 (l) Vide sup. recover damages, unless he be expressly acquitted by ver-
 sect. 52, 53. dict. after the acquittal of the principal. Yet whether (l)
 the justices themselves may not, in a case of this nature, if
 they think fit, assess the damages without any jury, or else
 assess them by an inquest of office, may deserve to be con-
 sidered. Also it seems to be to little purpose to require an
 actual acquittal of a person, where it appears by the acquittal
 of another, that he could not be guilty. However it seems
 clear, that a person appealed as accessary to two principals,
 shall not (m) recover damages by the acquittal of one of
 them; because for what appears he might be accessary to
 (n) S. P. C. the other. Neither (n) shall he recover damages where he
 is discharged by the death of the principal before his at-
 tainder, because it doth not appear that he might have been
 guilty.

SECT. 143. It seems at this day, that if a defendant, appearing upon erroneous process to a good appeal, be acquitted, he shall recover damages by the intent of the said clause, because such an acquittal is a good bar of any other prosecution for the same felony, and the life of the appellee was put in danger by the (a) appeal. But there were formerly some opinions, that the appellee in such a case should not recover damages, because his life was not in danger at the time of the trial, for that he might have taken advantage of the error in the process.

(a) 9. H. 5. 2.
2. Inst. 386.
Qu. S.P.C. 169.
F. Cor. 444.
Yelverton 204
Cro. Jac. 284
4. Co. 43.

But granting it to be a good rule, that the defendant shall not recover damages where his life is not in danger at the time of the trial, which yet I find not confirmed by any authority, besides the *Year Book* of 9. Hen. 5. c. 2. it may be answered, that in the case in question the defendant's life is in danger at the time of the trial, because the error in the process is salved by his appearance; as shall be shewn more at large in the chapter concerning Processes.

SECT. 144. If a person who has taken a release, or prayed the benefit of clergy, waive such release, or benefit of clergy, and put himself on his trial and be acquitted, it is said, (b) that he shall recover his damages, notwithstanding the objection that the taking such release or making such prayer, seem to carry with them an implied confession of guilt.

(b) S. P. C.
169. 173.
Vide F. Cor.
386. & 33. H.
6. 1.
Sup. sect. 135.

SECT. 145. Wherever any person is so far acquitted on an appeal carried on at the suit of the party, as to be intitled to his damages, (c) he shall have judgment for them without any process to bring in the party to answer to the damages, because he is still in court; but where he is so acquitted on an appeal carried on at the suit of the king after a nonsuit of the party, he shall not recover damages, without a *scire facias* to bring in the party, because he was out of court by the nonsuit.

(c) S.P.C. 169.

SECT. 146. FOURTHLY, In the construction of these words, "The justices before whom the appeal shall be heard and determined, shall punish the appellor by a year's imprisonment, and the appellor shall nevertheless restore to the parties appealed their damages, according to the discretion of the justices, having respect to the imprisonment, or arrestment, that the party appealed hath sustained by reason of such appeals, and to the infamy that they have incurred by the imprisonment, or other wife, &c," the following points have been holden.

FIRST,

- (2) 10. Ed. 4. **FIRST, That justices of *nisi prius* (a) have no power to**
 14. give judgment for such imprisonment or damages, upon an
 22. Ed. 4. 10. acquittal before them, whether before or since the statute of
 S. P. C. 119. 14. Hen. 6. by which it is enacted, " That such justices
 2. Inst. 386. " shall have power, in all cases of felony or treason; to give
 " their judgments as well where a man is acquitted, as
 (b) S. P. C. " where he is attainted." For (b) the words above-men-
 169. tioned in the statute of *Westminster the second*, are to be in-
 tended of such justices only before whom the whole plea of
 the appeal is heard and determined, and therefore in strict-
 ness can extend to the justices of the king's bench only,
 where the appeal is commenced before them, (for that the
 whole appeal is in such case heard and determined before
 them, either in person, or else by others delegated by, and
 representing them,) and not to the justices of *nisi prius*, who
 have nothing to do with the appeal before the trial, nor any
 original power to try it. And the statute abovementioned
 of 14. Hen 6. hath been construed to intend only to enable
 justices of *nisi prius* to give the principal judgment, and not
 to transfer to them from the court of king's bench a power
 in collateral matters. Yet (c) justices of *nisi prius* have by
 (c) 4. Co. 95. usage, not now to be disputed, gained a power to assess the
 2. Inst. 386. damages, and to inquire of the sufficiency of the plaintiff to
 Dyer 120. answer them, and also of the abettors. But I do not find
 B. Appeal 113. that they have ever given judgment for the damages. Yet
 F. Corone 463. (d) 22. Ed. 4. 19. there is no doubt (d) but that, if such justices be also jus-
 8. H. 5. 6. tices of assize, and as such have an appeal commenced before
 B. Appeal 113. them, they may, as justices of assize, upon the acquittal of
 the appellee, not only inquire of the damages, &c. but also
 give judgment for them, both by the letter and meaning of
 the statute.

- Sec. 147. SECONDLY, That if a jury give too small*
 (c) C. Elir. 213. damages to the appellee, the Court may increase (c) them ;
 Vide 2. Inst. from which it seems to follow, that if a jury give too large
 387. damages, the Court may abridge them. And surely no less
 42. Assize 19. can be implied by the statute's ordering, " that the damages
 seems con- " shall be given according to the discretion of the justices,
 trary. " respect being had to the imprisonment, &c." And this
 construction also seems agreeable to the rules of law in
 other cases, by which the Court is said (f) to have a general
 (f) 3. H. 6. discretionary power, except in some special cases, as local
 29. (g) trespasses, &c. either to increase or abridge the damages
 14. H. 4. 9. found by an inquest of office ; and where a jury which hath
 8. H. 4. 23. acquitted an appellee inquires afterwards of the damages, it
 p. 9. seems in respect of such inquiry to be no more than an in-
 3. H. 4. 4 p. quest of office, though it were returned to try the cause.
 16. 7. H. 6. 31.
 19. H. 6. 31.
 19 H 6. 10. B. Abr. 36. Vide 27. H. 8. 2. Sup. f. 52. (g) 27. H. 8. 2. 19. H. 6.
 42. 19. H. 6. 10 p. 28. 3. H. 6. 29.

Sect. 148. THIRDLY, That if there be several appellees, and all of them acquitted, the damages ought to be severally (a) assessed as to every one of them; and this doubtless is agreeable both to the letter and meaning of the statute, which provides, that in the giving the damages, respect shall be had to the imprisonment and infamy, and other damage sustained by reason of the appeal; and these being several, and receiving different aggravations from the different circumstances of the person's particular case, it cannot but be reasonable, that the damages be assessed severally also.

(a) S. P. C. 170.
Dyer 120.
11. H. 4. 16.
12. Coke 126.
2. Inst. 386.
41. Affize 24.
F. Damages 77.
8. H. 5. 6.

Sect. 149. FOURTHLY, That a monk or feme covert, being appealed without the abbot or husband, cannot have judgment for the damages on their acquittal, because they are disabled by the law to recover any damages without the abbot or husband; and the general words of a statute shall not be construed to enable persons in a point wherein the common law hath disabled them. But the authority of this opinion, as to a wife, is questioned by (b) *Hobart*; neither do any of those (c) who seem to give it greater weight, bring any other proof of it than a note in *Fitzherbert's Abridgement*, of a resolution to such purpose in the time of *Edward the third* as to the case of a monk, and an assertion that the law is the same in the case of a wife.

(b) Hob. 98.
(c) 2. Inst. 395.
11. Coke 77.
9. Coke 73.
1. Roll 170.
S. P. C. 170.
F. Coverture 176.

Against which it may be plausibly argued, that since the imprisonment and infamy sustained by a *feme covert*, in a malicious appeal against her, are far from being less grievous in respect of her coverture, and are a good (d) ground of a writ of conspiracy at the common law, brought by the husband and wife, and since the wife may take any thing to the benefit of her husband, and it appears to the Court that the appellant by his own act, without any default either in the husband or wife, gives them a good title to the damages; and since no express judgment can be given for the husband, being not a party to the record, and it is most for his advantage, as well as his wife's, that a present judgment be given; it may perhaps be thought no unreasonable construction of the statute, that in this particular case judgment should be given for the wife to recover the damages, which would as much enure, for the benefit of herself and her husband, as an express judgment for them both on a writ of conspiracy.

(d) 2. Inst. 326.
24. Ed. 3. 73.
1. Inst. 132.

However, it is certain, (e) that if the husband and wife are both of them appealed and acquitted, they shall have a joint judgment for the damage done to the wife, for which the wife alone shall sue execution, if the husband die without suing it, and the husband alone shall have judgment for the damage done to himself.

(e) F. Judg.
108.
2. Inst. 385,
386.
12. H. 4. 16,
17.
S. P. C. 170, b.

FIFTHLY,

FIFTHLY, In the construction of the words, " And if peradventure the appellor be not able to recompense the damages, it shall be inquired by whose abetment, by malice, the appeal was commenced, if the party appealed do fire it; and if it be found by the same inquest that any man is abettor through malice, he shall be distrained by a judicial writ, at the suit of the party appealed, to come before the justices, &c." the following points have been holden.

- Secſ. 150.* FIRST, That (a) the abettors are in no case liable to render damages, where the appellant himself is not liable, though never so sufficient; and this is confirmed by experience, and the manifest purport of the statute, which by directing that the abettors be inquired of, where the appellant appears insufficient to answer the damages, plainly intimates that they are to be inquired of in such cases only, wherein the appellant must have answered them, if he had been able; and agreeably hereto it seems to be settled, (b) that a release of damages to the appellant will discharge the abettors, if they can produce it.

- (a) S. P. C. 170, 171.
2. Infl. 386.
- (b) 20. H. 7. 7.
- Secſ. 151.* SECONDLY, That (c) unless the appellant be found by the jury to be insufficient, the abettors shall not be inquired of; and yet the statute doth not expressly direct that the jury shall inquire of the sufficiency of the appellant. But it being the general method of the law in other cases of the like nature, to make an inquiry by a jury, it is certainly a reasonable construction of the general words of the statute that such inquiry may be made in the present case. Yet, whether the justices themselves may not, if they think fit, make such inquiry without a jury, it being but an inquiry of office, may deserve to be considered for the reasons in the 52d and 147th sections of this chapter. However, there can be no doubt but that the insufficiency of the appellant must appear by one or the other of these inquiries, before the abettors can be inquired of.

- (c) 2. Infl. 386.
- (d) S. P. C. 171.
Qu. 8. Ed. 4. 3.
12. Coke 126.
2. Infl. 386.
Rastal 44.
B. Appeal 96.
- Secſ. 152.* THIRDLY, That (d) the abettors may traverse the jury's finding the appellant to be insufficient, or that they abetted him, &c. For it is hard that a man should be concluded by any matter whatsoever, found to his prejudice in an action to which he is no way privy. Also it is holden by (e) *Staundford*, that if a jury on the acquittal of one defendant find that there were no abettors, yet they may afterwards on the acquittal of another defendant find that there were abettors, because there is no reason that the first inquest shall bind one who is not privy to it, and has no remedy against it. But the contrary hereto is holden in

the *Book of Assizes*, (a) where the Court refused to inquire (a) 41. Affize
of the abettors on the acquittal of a defendant, because it 24.
had been found on the acquittal of another, that there were
no abettors: but this case, if thoroughly examined, seems
repugnant to itself; for the jury were permitted on the se-
cond acquittal to tax the damages, which yet are said to have
been taxed before; but to what purpose should this be done,
unless it were first found that the appellant was sufficient, or
else that there were abettors, which could not but controul
the first finding, as also the second taxation of the damages
must do, unless it were wholly the same with the first.

SecT. 153. FOURTHLY, That (b) if the appellant be (b) 12. Cok
found sufficient to render part of the damages, and not the 126.
whole, judgment shall be given against the abettors for the
whole, and not for part against them, and for the other part
against the appellant; for that these words of the statute,
“ If peradventure the appellor be not able to recompense
“ the damages,” must be understood of all the damages.
B. Appeal 96. Contra 41. Affize 8. F. Corone 219. B. App. 74. (b) 12. Cok
S. P. C. 170.
8. Ed. 4. 3.
8. H. 5. 6.
26. H. 8. 3.
2. Inst. 386.
F. Cor. 29.
386. 463.

SecT. 154. FIFTHLY, That (c) the appellee after his ac- (c) F. Cor. 13.
quittal may sue for the damages by attorney.

SecT. 155. SIXTHLY, That (d) though the statute ex- (d) F. A&f. file
pressly give only judicial process for the recovery of the Stat. 28.
damages against the abettors, yet the appellee may, if he 2. Inst. 386,
think fit, take out an original writ of abetment, grounded 387.
on the statute, and therein count to greater damages than S. P. C. 171.
were found by the jury; which in respect of such finding, Co. Lit. 139.
being but in nature of an inquest of office, shall not con-
clude the appellee.

SecT. 156. SEVENTHLY, That (e) if the appellee chuse (e) S. P. C.
rather to proceed for the recovery of his damages by judicial 171.
process, than by original; it is safest for him to make use of 2. Inst. 386,
a *distress*, which is given by the express words of the statute; 387.
yet there is a note (f) of an old case, wherein a *venire facias* (f) F. Cor. 102.
was first awarded; but it is (g) questionable, whether this (g) S. P. C.
be justified by the statute or not. 171.
2. Inst. 386,
387.

SecT. 157. EIGHTHLY, That (b) it is time enough for (b) S. P. C.
the appellee to shew the time and place of the abetment, 171.
when the abettors appear upon such process; and by such 2. Inst. 386.
shewing he supplies the omission of the jury in not finding F. Cor. 45.
any time or place, on their inquiry of the abetment, &c.

SecT. 158. NINTHLY, That (i) the nonsuit of an ap- (i) S. P. C. 171.
pellee, either in an original writ, or process against the abet- 1. Inst. 139.
tors, F. Corone 386.

tors, whether before or after appearance, is no bar of a second writ or process.

As to THE SEVENTH GENERAL POINT, *viz.* Where the appellant is to be fined.

(a) S. P. C. 170. *F. Fines* 2. 1. Affize 9. 24. Affize 39. 8. H. 4. 17. *Sett.* 159. There can be no doubt but (a) that by the express words of the above-expounded statute of *Westminster the second*, c. 18. wherever the appellant, or his abettors, are by the purport thereof to render damages to an appellee, they are also to be fined to the king, and imprisoned for a year.

(b) See the books cited in the following part of this section. *F. Cor.* 137. 8. Coke 60. S. P. C. 170. seems contrary. (c) 40. Affize 1. *F. Corone* 214. (d) *F. Fines* 49. 41. Affize 8. *F. Corone* 219. *Damages* 77. (e) 22. Affize 82. *F. Cowane* 187. (f) *F. Fines* 107. (g) 8. Coke 60. (h) 9. H. 4. 1. *F. Fines* 28. *B. Fines* 16. (i) *F. Cor.* 121. (k) *B. Appeal* 25. 8. H. 4. 17. Also it seems clear from the general purport of the (b) books, that an appellant appearing to have brought an ill-grounded appeal, whether of felony or (c) *mayhem*, shall be fined, in many cases wherein he is not liable to render damages by the statute abovementioned; as where he is (d) nonsuit, either against all, or part (e) of the appellees only, whether after, or, as some (f) have holden, before appearance, or where the writ abates through the (g) default of the appellant in wilfully suing by a (b) wrong name, or (i) a vitious writ, &c. and even a *feme covert*, (k) suing an appeal known by her to be groundless, as for the death of a husband whom she knows to be alive, shall be fined.

(f) *F. Brief* 612. But it is certain that where a writ abates by the act (l) of God, or for any other cause no way imputable to the appellant, he shall neither be fined nor amerced.

Also it is certain that an infant is in no case to be fined for a false appeal; but some (m) have holden that he may be amerced, which is contradicted by others, who say, (n) that an infant can in no case be amerced.

(m) *B. Fines* 37. 41. Affize 14. (n) *C. Lit.* 127. *Cro. Car.* 164. Vide 1. *Danv. Abr.* 462, 463.

CHAPTER THE TWENTY-FOURTH.

OF APPROVER.

HAVING gone through the several kinds of APPEALS by *innocent persons*, I am now in the second place to consider the nature of AN APPEAL by an *offender* confessing himself to be guilty, who is commonly called a *Prover*, or (a) *Approver* in English, or *Probator* in Latin, because he must at his peril prove his appeal in every point, and for so doing is pardoned of course.

(a) S.P.C. 144.
3. Inst. 120.
2. Hale 225,
226.

For the better understanding the nature of such appeal, I shall examine the following particulars.

1. When a man may be said to become an approver.
2. Who may be admitted to be approvers, and who not.
3. In what cases a person may be an approver.
4. Of what offences a person may be an approver.
5. Against what offenders a person may be an approver.
6. Before what justices a person may be an approver.
7. How they are to be ordered and demeaned, both before and after the appeal.
8. What process is to be awarded against the appellees.
9. In what manner the Court is to proceed upon, and after the trial.
10. How the approver is to be rewarded for making good his appeal.

As to the FIRST POINT, viz. When a man may be said to become an approver.

SECT. 2. It seems (b) agreed, that a man is then properly an approver, when being indicted of treason or felony, before competent judges, and in prison for the same, and capable of being an approver, he confesses the indictment, and

(b) 2. Hale
227. 229
3. Inst. 129,
130.
is Cowper 335.

is sworn to reveal all the treasons and felonies he knows, and then before a coroner enters his appeal against all who were partners with him in the crime in the indictment, being at the time of the appeal within the realm.

As to THE SECOND POINT, *viz.* Who may be admitted to be approvers, and who not; I shall observe,

(a) 3. Inf. 129. *Sec. 3.* FIRST, that (a) a peer of the realm cannot be Summary 192. an approver.

(b) 3. Inf. 129. *Sec. 4.* SECONDLY, (b) that neither the person attainted of Summary 192. treason or felony, nor even one outlawed in a personal action, as some (c) say, can be an approver, because by his S. P. C. 146. B. Cor. 81. 211. F. Cor. 112. attainer or outlawry he is out of the law, and his accusation shall not be of such credit, as to put any person upon 127. 167. 387. his trial.

443. 445. 11. Affize 27. 17. Affize 4. (c) B. App. 57. Sup. c. 23. f. 32. B. Cor. 175.

(d) 3. Inf. 129. *Sec. 5.* THIRDLY, That an (d) idiot, or person born S. P. C. 147. deaf and dumb, or any one who is *non compos* at the time, or Sup. c. 23. f. 32. an infant under the age of discretion, cannot be an approver, because no such person ought to be admitted to take the oath before the coroner, without which there can be no approvement.

(e) S. P. C. 147. *Sec. 6.* FOURTHLY, That it is holden both by *Staund-* (f) 3. Inf. 129. *forde* (e), *Coke* (f), and *Hale* (g), that no woman nor infant can be an approver. But it is observable that the opi- (g) Sum. 192. nions of *Staundforde* and *Coke* seem chiefly to be grounded 2. Hale 233. on this foundation, that the appellee may have such like exceptions against approvers, as the defendant may have on appeal brought by a lawful person, and therefore may except that the approver is within age, or a woman, &c. because such persons cannot wage battle; but it being settled at this day, that these are no good exceptions to an appeal brought by a lawful person, as hath been more fully shewn in the

(h) *Sec. 30, 31.* precedent (h) Chapter, it seems to be justly questionable, whether they are now to be admitted as good exceptions to an appeal by an approver. To which may be added, that in the opinion of (i) *Hale*, contrary to that of (k) *Staund-* (i) Sum. 192. *forde* and (l) *Coke*, a man above the age of seventy, or 2. Hale 233. con. (k) S. P. C. 147. maimed, may be an approver, though he cannot wage bat- (l) 3. Inf. 129. tle; from whence it follows clearly, that in the judgment Vide Cowp. of *Hale*, there is no necessity that an approver should be 336. Mrs. able to *wage battle*. *Rudd's case.*

(m) S. P. C. 147. *Sec. 7.* FIFTHLY, That it seems to be (m) agreed, that 3. Inf. 139. a person in holy orders cannot be an approver, because it is a rule,

a rule, that no member of the clergy can sue any appeal whatsoever, in a matter or cause of death.

As to THE THIRD POINT, *viz.* In what cases one may be admitted to be an approver; I shall observe,

SECT. 8. FIRST, That no one (*a*) shall be admitted to be an approver, till he hath confessed the crime charged against him in his indictment. (*a*) F. Cor. 50. 251. 441.

SECT. 9. SECONDLY, That it is holden (*b*) in some books, that he who hath once pleaded *not guilty*, cannot be an approver, but shall be hanged, because he is found false, and his confession contradicts his former plea; yet the contrary hereunto is holden by (*c*) others, and (*d*) *Staundforde* admits that the Court, of grace, may admit such persons to be approvers, and this is as much as can be contended for in any other case; for it seems (*e*) agreed, that the Court is not bound of right to admit any person whatsoever to be an approver. (*b*) 3. Inf. 129. Summary 193. S. P. C. 144. F. Cor. 440. 21. Edw. 3. 18. 19. H. 6. 47. (*c*) Finch 387. 12. Edw. 4. 10. Vide 2. H. 7. 3. (*d*) S. P. C. 145. (*e*) 3. Inf. 129. Summary 194. 12. Edw. 4. 10. 11. H. 6. 34.

11. Hen. 7. 5. 1. Hale 226. 228, 229.

SECT. 10. THIRDLY, That it is (*f*) agreed, that any one indicted of treason or felony may be an approver, but that unless the crime with which the person is charged, amount either to felony or treason, he cannot be an approver. (*f*) 19. H. 6. 47. 3. Inf. 129. 21. Edw. 3. 18. Finch 387. F. Corone 231. 448. B. Corone 41. 2. Hale 227.

SECT. 11. FOURTHLY, That it is also (*g*) agreed, that no person accused of treason or felony, can be an approver, unless he be actually indicted for it; because his confession amounts not to a conviction until he be indicted, and consequently puts it not in the power of the Court to give judgment against him, when his appeal shall be rejected or falsified, as every approvement ought to do. (*g*) 3. Inf. 129. Summary 193. 2. Hale 228. S. P. C. 143. F. Corone 231. seems contrary.

SECT. 12. FIFTHLY, That it seems also to be generally (*b*) agreed, that if a person indicted be also appealed of the same felony, he can no longer be an approver; the reason whereof seems to be, that though the king may in his discretion, by admitting a person to be an approver, respite the judgment and execution of one prosecuted by indictment, which is his own suit, yet he cannot delay them in an appeal, which is the suit of the party; and *à fortiori* therefore it follows, that (*i*) if a person be appealed only, and not indicted, he cannot be an approver. (*b*) Inf. 129. Finch 387. Summary 193. 2. Hale 228. S. P. C. 147. 181. (*i*) 2. Rich. 3. 22. 11. H. 7. 5. B. Corone 228. F. Corone 441. 40. Affize 39. seems contrary.

SECT. 13. SIXTHLY, That notwithstanding the appeal of an approver may in some respects be looked upon as the

(a) F. Cor.

113.

S. P. C. 147.

2. Hale 223.

11. H. 4. 93.

seems con-
trary.

suit of the king, and equivalent to an indictment, yet the appellee (a) of an approver cannot become an approver himself, not only because it would falsify the appeal of the first approver, in supposing that he had omitted some of his partners, but also because it would cause an infinite delay; for the appellee of such an approver might as well become an approver of others, and so on.

As to THE FOURTH POINT, viz. Of what offences a person may be admitted to approve another.

(b) S. P. C.

142.

2. Hale 227.

Summary 194.

3. Inst. 129.

150.

2. Inst. 629.

Finch 387.

(c) F. Cor.

127. 217.

40 Affize 39.

21. H. 4. 93.

(d) 27. Affize

69.

10. Edw. 4. 14.

F. Cor. 35.

208.

B. Corone 154.

11. Edw. 4. 10.

Sec. 14. It seems (b) agreed, that no one can approve another of any other offence, but the very crime contained in the indictment, and therefore that he cannot approve a man of a crime of a different (c) nature, nor even of being accessory (d) before or (e) after to the same crime, because no man can abet, or receive himself. But it seems also to be agreed, that inasmuch as the oath of an approver is (f) general, to discover all the treasons and felonies he knows, if he accuse any persons of crimes of a different nature from his own, whether in the same, or a foreign (g) county, his accusation will be a reasonable ground to carry on a prosecution against them for such crimes, though it (h) be not of itself of force sufficient to put them on their trials.

(f) 2. Inst. 629. Summary 194. Cowper 335.
(g) F. Cor. 126. (h) F. Cor. 126, 127. 387.

As to THE FIFTH POINT, viz. Against what offenders a person may be admitted to become an approver.

(i) F. Aff. 446.

F. Cor. 460.

S. P. C. 154.

(k) S. P. C.

145.

1. Edw. 4. 16.

F. Cor. 153.

(l) Sum. 194.

21. H. 6. 34.

(m) Sum. 195.

S. P. C. 145.

F. Cor. 133.

(n) B. Cor. 49.

21. H. 6. 34.

Summary 195.

(o) 1. Edw. 7.

16. 1. Affize 2.

Sec. 15. It seems (i) clear, that a man may be an approver against any person whatsoever within the realm, whether he live in the same or in a foreign county, provided he be named of the county wherein he dwells. But it is said, that if it appear either by the (k) confession of the approver, or the return (l) of the sheriff, or the testimony (m) of persons of credit in the (n) county, that there are no such persons as some of those named in the appeal, *in rerum natura*, or within the (o) realm, or even (p) within the county whereof they are named in the appeal, the approver shall be hanged, unless the (q) Court in mercy will spare him, because his appeal in respect of such persons appears to be false, or to no purpose.

(p) F. Co. 46. (q) S. P. C. 145.

As to THE SIXTH POINT, viz. Before what justices a person may be admitted to be an approver.

(r) 2. Inst. 130.

S. P. C. 143.

Summary 194.

Sec. 16. It seems to be a settled rule (r), that a man may be an approver before any justices who have power to assign a coroner

coroner to take the appeal; and for this reason it seems to be (*a*) agreed, that one may be an approver before the justices of the king's bench, and justices of gaol-delivery, and justices in eyre. And upon this ground it is holden in *Sir Edward Coke's* third (*b*) Institute, and also in *Sir Matthew Hale's* (*c*) Pleas of the Crown, under the chapter of Approver, that a man may be an approver before justices of *oyer* and *terminer*. But the foundation of this opinion seems to be overthrown by what is said by both these (*d*) authors in other places, wherein it is holden that justices of *oyer* and *terminer* cannot assign a coroner, because it is not within their commission: And it seems to be (*e*) a general rule, that those only can receive the appeal of an approver who can assign a coroner to take it; and therefore it seems to be agreed, that neither a (*f*) court-baron, nor (*g*) justices of peace, nor any other special (*h*) justices, can receive such appeal, unless their commission extend to it. And for the like reason it seems to be the opinion of (*i*) *Sir Edward Coke*, that THE LORD HIGH STEWARD OF ENGLAND cannot receive such an appeal; but this is contradicted by Sir (*k*) *Matthew Hale*.

144. (*l*) 3. Inst. 130. (*k*) Sum. 194.

As to THE SEVENTH POINT, *viz.* In what manner an approver is to be ordered and demeaned, both before and after the appeal; the following particulars seem most remarkable.

Sec. 17. FIRST, It seems to be (*l*) agreed, that where-ever a person indicted of treason or felony confesses the indictment, whether he appealed others or not, he puts it entirely in the discretion of the Court, either to give judgment, and award execution against him, or to respite them until he shall have made good his appeal.

Sec. 18. SECONDLY, That (*m*) whenever a person is admitted to become an approver, the Court shall assign a coroner to receive his appeal, and shall take an oath from him to discover *all* the treasons and felonies that he knows.

Sec. 19. THIRDLY, That (*n*) the Court which admits a man to become an approver, ought to limit him a certain number of days, to make his appeal in; during which it is holden by (*o*) some, that he is to have a penny a-day as his wages from the king; but by (*p*) others, that he ought not to have it until he has made good his appeal, by convicting the appellees.

B. Cor. 34. 11. H. 4. 93. (*p*) 21. H. 6. 34. Vide 2. Hale 230

Sec. 20. FOURTHLY, That the approver during all the time assigned him for making his appeal, ought (*a*) to be at his liberty, and out of prison; for (*b*) he may disavow an appeal made by duress of imprisonment; but if he alledge that an appeal was extorted from him by such duress, and such allegation be found to be false, either by the examination of the coroner, or by an inquest of office, the approver shall be hanged.

Sec. 21. FIFTHLY, that (*c*) the approver ought to make his appeal before the coroner, on every one of the days limited for the making of it; for if he fail on any one of them, and the coroner record such failure, judgment shall be given against him.—And so shall it be (*d*) also, if after he have formed his appeal before the coroner, he make the least variation in his repeating it before the Court, and the coroner record such variation.

As to THE EIGHTH POINT, *viz.* What process is to be awarded against the appellees.

Sec. 22. It seems (*e*) agreed, that the coroner may award process to the sheriff, against any appellee in the same county, until it come to *the exigent*; but it is certain, that (*f*) he cannot award it to any other officer except the sheriff, nor to any sheriff out of his own county. And it seems (*g*) questionable, whether he be not restrained by the statute of MAGNA CHARTA, c. 17. to award *the exigent* to the sheriff of his own county. But it seems (*h*) agreed, that the justices of the king's bench, or justices in eyre, might by the common law as well award process of outlawry, as any other process, against appellees in any county whatsoever.—And it is (*i*) certain, that justices of gaol-delivery may award process in any county, to apprehend and try them by force of 28. Edw. 1. commonly called the statute *de Appellatis*; but whether this statute do empower such justice to award process of outlawry into a foreign county, may deserve to be considered (*k*).

As to THE NINTH POINT, *viz.* In what manner the Court is to proceed upon, and after the trial; I shall observe,—

Sec. 23. FIRST, That it is in the election (*l*) of the appellee, either to put himself upon his country, or to wage battle with the approver.

Sec. 24. SECONDLY, That let there be never so many appellees, if they *wage battle*, the approver must fight them (a) all. But on the contrary, it seems to be generally (b) (a) S. P. C. agreed, that if a person appealed by several approvers of one 280. and the same felony, vanquishes any one of them, he shall be 2. Hale 233, acquitted against them all, and all of them shall be con- 234. Sum. 196. demned, in the same manner as if every one of them had 47. Edw. 3. 5. been actually vanquished. But if an approver having ap- 19. H. 6. 335. pealed several of the same crime, be vanquished by one of 3. Inst. 130. them, it seems to be (c) holden, that his appeal is still in (b) Sum. 196. force against the rest. But the note in (d) *Fitzherbert's* S. P. C. 74. *Abridgment*, which seems to be the foundation of this opi- 106. 149. 180. nion, seems rather to be intended of AN APPEAL by an *immo-* 11. H. 4. 93. *cent person*, than of AN APPEAL by an *approver*, in relation 21. H. 6. 34. 35. to whom it seems to be a general rule, that being once falsified B. Cor. 31. 49. as to any one of the appellees, he ought to be condemned, 3. Inst. 130. F. Corone 143. 7. Edw. 3. 12. as hath been more fully shewn in the 9th and 15th sections (c) S. P. C. 108. of this chapter. (d) F. Cor. 98.

Sec. 25. THIRDLY, That if the king pardon the ap- prover or appellee, hanging the appeal, the approvement (e) (e) 47. Ed. 3. ceases, and the appellee shall be discharged. For in the first 16. case, by the pardon the felony is extinct, and a man can no 47. Edw. 3. 5. longer be an approver than while he is under the guilt of F. Cor. 103. the crime whereof the approvement is made, and liable to Sum. 201. be condemned by the Court, whenever his appeal shall be 3. Inst. 130. falsified, &c. And in the second (f) case, it cannot be (f) Sum. 201. doubted but that the king's pardon will discharge the ap- B. Corone 49. pellee, because an approvement is rather the suit of the king, 21. H. 6. 35. than of the party.

Sec. 26. FOURTHLY, That whether the appeal of an approver be falsified by the (g) confession or the vanquishment (g) F. Cor. 128. 369. (b) of the approver, or verified by the conviction or the van- F. Affize 421. quishment of the appellee, yet if the offence be within the Sum. 197. con. benefit of clergy, neither the approver in the first case, nor 21. Edw. 3. 17. the appellee in the second, are excluded from it, any more B. Corone 38. than in the case of an indictment. F. Corone 447. (b) B. Cler. 5. 16. 11. H. 4. 93.

As to THE TENTH POINT, *viz.* How the approver is to be rewarded for making good his appeal.

Sec. 27. It is said, (i) that if an approver convict all (i) Sum. 197. the appellees, whether by battle or by verdict, the king *ex me-* 2. Hale 233. *rito justitia* ought to pardon him as to his life, and also give S. P. C. 142. him his wages (k) from the time of the appeal to the time 3. Inst. 129, of his conviction. But (l) it seems, that anciently he ought 130. not to be suffered to continue in the kingdom. Con. 19. H. 6. 35. F. Corone 6. (l) S. P. C. 142

(k) Vide sup. f. 19.

Vide the case
of Margaret
Car. Rudd,
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And it is recited by 5. Hen. 4. c. 2. " That divers notorious felons, for safeguard of their lives, had become provors, to the intent, in the mean time, by brocage, and great gifts, to pursue and have their pardons, and then after their deliverance, had become more notorious felons than they were before; and thereupon it is enacted, " That " if any person pray or pursue, or cause to be prayed or " pursued for any such felon so attainted by his own confession, to have any charter of pardon, the name of him " that pursues such charter be put in the same charter, making mention that the same charter is granted at his instance. And if he to whom such charter is granted become a felon again, the party who pursued the charter " shall forfeit one hundred pounds.

END OF THE THIRD VOLUME.

A

T A B L E

O F

P R I N C I P A L M A T T E R S

C O N T A I N E D I N T H E

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61. An appeal is a local action, and cannot be brought in a foreign county, f. 35
62. By 2. & 3. Edw. 6. c. 24. it may be tried by a jury of the county where the death shall happen, although the wound may have been given in a foreign county, *ib.*
63. In an APPEAL BY A WIFE, she must exculpate herself from the death, and prove the fact of marriage, *ib.* 308. f. 36
64. Therefore *ne unques accouple, &c.* is a good plea, and may be tried by certificate, *ib.*
65. The appeal may alledge *inter brachia sua interfecit et non aliter*, and then a voidable sentence of divorce is a good plea in bar. *Sed quare*, 308
66. A wife may appeal, notwithstanding she has forfeited her dower by her husband's attainder for treason, 308. f. 37
67. So also she may appeal his death, although she had eloped from him, *ib.*
68. If the widow marries pending her appeal, the appeal is gone, 309. f. 38
69. If she marry after judgment, *she cannot pray execution*, *ib.*
70. But in this case the appellee must obtain the king's pardon, *ib.*
71. For although he cannot be indicted, being already attainted, yet the Court *ex officio*, or at the king's demand, may award execution, *ib.*
72. AN APPEAL BY THE HEIR cannot be brought if the deceased had a WIFE living, and innocent of the fact at the time of the death, Page 309. f. 39
73. But if the wife partake of the guilt, the heir may bring an appeal against her, excepting that the petit treason be pardoned, which pardons the murder also, 309
74. It must also be brought by the *legal heir general*; but if he also partake in the guilt, the next heir may bring it against him, *†* f. 40
75. Therefore a father cannot appeal for the death of his son, for he cannot be his heir, *ib.*
76. So none, except the wife, can appeal for the death of one attainted of felony, *ib.*
77. A *special heir*, as by Borough English, &c. cannot appeal for the death of his ancestor; for it must be by the *general heir*, *ib.*
78. Where the eldest of two sons is attainted of treason or felony, neither of them can appeal for the death of their father, *ib.*
79. If there be an eldest son by one venter, and a middle and a younger son by another venter, and the middle son be killed, the younger son, and not the eldest by the former venter, can alone appeal his death, *ib.*
80. Therefore a plea to an appeal by a brother, viz. *that there is an elder brother*, is not good, except it shews him to be an elder brother of the whole blood, *ib.*
81. An appeal by an heir who dies pending the suit, cannot be continued by the next heir, 310. f. 41
82. But if the first heir die *within the year and day*, it is said the appeal may be commenced by the next heir; but the later opinions are otherwise, *ib.*
83. And *quere*, whether a *presumptive heir* may not bring an appeal, if the right to do it has never before *vested*, 311
84. By *Magna Charta* none but the general

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85. And if an appeal be brought by any other, the Judges are bound, *ex officio*, to abate the writ, ib.
86. By the common law an heir female might have an appeal for the death of her ancestor, as well as an heir male, 113
87. And now the heir male *deriving through a female*, may bring an appeal, ib.
88. In an appeal by an heir, it must appear by the writ, in what manner he is so, 311. f. 43
89. OF AN APPEAL OF LARCENY, 312
90. The appellant, in larceny, need not prove an *absolute* property in the goods stolen; if he has a *special* property in them it is sufficient, f. 44
91. Therefore the appeal may be either *general* or *special*, at the option of the appellant, ib.
92. But the *bare charge* of goods, without the *possession* of them, is not such a property on which *this* appeal can be maintained, ib.
93. How far a *villein* may appeal against his lord, ib.
94. The master and servant may separately appeal for the larceny of goods from the servant, they being the property of the master; but both cannot appeal for the same offence, f. 45.
95. The survivor of joint property may bring an appeal of larceny, 313
96. So also this appeal may be brought against the thief who steals my goods, from the person who stole them from me, ib.
97. But not if the first taker is a mere trespasser, claiming title to the goods he takes, ib.
98. Neither can an executor appeal for larceny committed on his testator, Page 313
99. An appeal of larceny may be brought as well against an infant, as an adult; and also against a *feme covert* without naming her husband, f. 46
100. An appeal of larceny must be brought in the county where the felony is committed, f. 47
101. If a robbery be in one county and the goods are taken into another, an appeal may be brought in either; in the first for the robbery, in the second for larceny, ib.
102. Therefore if one take me from the county of *A.* to *B.* and there rob me, the appeal must be in the county of *B.* ib.
103. But if by *menace* goods are brought from one county to another, perhaps the appeal may be brought in either, 313. f. 47
104. An appeal of larceny is not within the statute of Gloucester respecting being brought within a year and a day; but, *on fresh suit*, may be brought at any time, 314
105. OF RESTITUTION OF GOODS, 314. f. 49
106. Stolen goods not seized by the crown or lord of a franchise, may be retaken, *upon fresh suit*, at any time, by the owner, without prosecuting his appeal; but not after such seizure, ib.
107. Anciently *fresh suit* implied, that hue and cry should be made; but now, if the party be reasonably diligent to apprehend the offender, it is sufficient, 315
108. The jury who try the offence, are judges of the *fresh suit*, and upon their verdict the Court may award restitution, f. 52
109. And where the appellee is condemned by confession, &c. without trial, the Court may, by inquest of office, inquire of the *fresh suit*, and

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- to award or with-hold restitution,
Page 315. f. 52
110. But this inquest is rather for the satisfaction of the Court, than by necessity; for the judges may award a writ of restitution in their discretion, *ib.*
111. Anciently every appellant must have *attainted* the appellee before he was *intitled* to restitution, 316. f. 53
112. But now if *one* appellant *attaint*, an inquest shall inquire of the *fresh suit* made by other appellants, and restitution shall be awarded to them accordingly, without their being put to *attaint* the appellee, *ib.*
113. And the same may be done if the appellee die in prison, 316
114. And perhaps the same shall be done, if the appellee be outlawed, or have benefit of clergy before conviction, or stand mute, or challenge above twenty, or break prison, &c. *ib.*
115. On an appeal against two, if one is acquitted, yet the appellant shall have restitution, *ib.*
116. If both were acquitted, the appellant forfeited his goods to the king for his false appeal. But *quere*, if the goods are not seized as waived, &c. 316
117. But the appellant's *title to restitution* shall not be barred by any seizure of the goods, as waifs, estrays, the goods of felons, &c. 317. f. 54
118. Nor even by a sale of them *bona fide* made in market overt, *ib.*
119. Nor shall the *prosecutor of an indictment* be barred of his restitution by any such seizure or sale in market overt, &c. *ib.*
120. By 1. Jac. 1. c. 21. the sale of stolen goods to any pawn-broker within two miles of London shall not change the property, *ib.*
121. By 21. Hen. 8. c. 11. the prosecutors of indictments for goods stolen, or obtained by any larceny, are *intitled to writs of restitution* from the Court, in the same manner as if the felon had been attained by appeal, Page 317
122. But awarding *writs of restitution* is now obsolete, and the judges will order redelivery of the property in court, 318. (N) 2
123. By 31. Eliz. c. 12. stolen horses sold in market overt shall be restored, upon payment of the price sold for, *without prosecution*, (N) 3.
124. In other cases, if it shall appear that the owner has neglected those endeavours to prosecute the felon which the ends of public justice require, the Court may refuse to grant restitution, 319
125. The appellant shall have only such goods restored as are mentioned in the appeal, 319. f. 57
126. And if the owner has retaken his goods, and not included the whole of them in the appeal, it is questioned whether those left out are not confiscated, &c. *ib.*
127. The 'owner' may bring *trouver* either for the identical goods stolen, or for the produce of them if the identity be changed, 318. (N) 4
128. OF AN APPEAL OF RAPE, 320
129. How, and by whom this appeal might have been brought at common law, before the statute of Westminster 1. c. 13. reduced the crime to a trespass, 320
130. But the crime is made felony by stat. West. 2. c. 34. which impliedly restores the appeal; and therefore it must now conclude *contra formam statuti*, 321 f. 60
131. By 6. Rich. 2. c. 6. if the woman, after rape, consent, both parties are disabled from inheriting, taking dower, &c. and the next of blood shall have title; and the husband, father, or next of blood, may sue and convict the offenders, of life and member, &c. 321
132. To an appeal by a husband on this act, for the rape of his wife, it may

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- may be pleaded that they were not lawfully married, &c. *Page* 322. *f.* 62.
133. The consent of the woman need not be averred, *f.* 63
134. If an orphan be ravished by her next of kin, the next of kin to the ravisher shall have the appeal, *f.* 64
135. The next heir at the time of the rape shall have the appeal and the lands, &c. in exclusion to any *ex post facto* heir, *f.* 65
136. The next remainder man, or reversioner, shall have the woman's land, provided he be of kin to her, albeit another be nearer of kin; but not the appeal in exclusion to the next of kin, 323. *f.* 66
137. It must be shewn in *what manner* the person suing for the land, is next of blood to the offender, *f.* 67
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139. And *quære* whether the appeal must recite the statute, *f.* 69
140. The appeal must be brought in the county where the rape is committed, 324. *f.* 71.
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142. An appeal of arson is now obsolete, 325
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144. In what cases the parties to an appeal must appear in person, or may appear by attorney or guardian, 325
145. If the count in an appeal vary from the writ in a material point, it shall abate, 326
146. If several be present abetting a fact, but only one actually does it, the plaintiff may declare generally against all as principals, or specially setting out the manner of abetting, &c. *Page* 327
147. No circumlocution will express the words of art descriptive of the offence; as *murderavit* for murder; *rapuit* in rape, *cepit* in larceny; *mayhemavit* in maim, and *felonicè* in all felonies, *f.* 77
148. An appeal of larceny must shew to whom the goods belonged; and of death who was killed; for *cujusdam ignoti* will not do in appeals, *f.* 78
149. In rape, *felonicè rapuit* is sufficient, without the words *carналiter cognovit*, or any words to that amount, 328
150. And the same general manner is sufficient in larceny, stating the value of the property. But in *mayhem* the particular manner of the fact must be stated, *ib.*
151. And in an APPEAL OF DEATH, all the special circumstances of the fact must be set forth, both by common law, and the statute of Gloucester, 328
152. As the part of the body in which the wound was given; and therefore that it was *circa pectus*, or in the hand, leg, or arm, &c. &c. &c. is not sufficient either in an indictment or appeal, *f.* 80
153. And where there is a sufficient certainty, the addition of an indefinite description shall be rejected as *superfluous*, 329
154. The length and breadth of the wound ought to be stated, that it may appear that it was mortal, 329. *f.* 81
155. But, describing the part, and that he gave him *mortalis vulnus penetrans in et per corpus*, &c. is sufficient, *ib.*
156. The word *percussit* should be inserted where the fact will bear it, but *quære* if it be absolutely necessary, 329. *f.* 82
157. So also in poisoning, the count must

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- must aver that the party received and drank the poison; and this defect shall not be supplied by any implication, Page 329. f. 82
158. The count ought expressly to shew that the party died of the hurt specially set forth, 330. f. 83
159. Therefore *qua suffocatione obiit*, instead of *de qua suffocations*, &c. is erroneous, ib.
160. But it may alledge that he died of the several poisons or wounds, they having been before particularized, without stating any wound or poison in particular, ib.
161. Or perhaps the several causes of the death may be alledged in the alternative, ib.
162. The particular weapon also with which the fact was committed must be set forth; but if the evidence vary in this respect it is not material, 330. f. 84
163. If the killing be by poison, drowning, suffocating, burning, or the like, the circumstances must be alledged as specially as possible, ib.
164. And an appeal cannot be supported by an inverse evidence, as to the mode of killing, ib.
165. *Vi et armis*, are not necessary in appeal, 331. f. 85
166. An appeal by stat. Gloucester, must declare the deed, the year, the day, the hour, the time of the king, the town, and the weapon, 331
167. An omission of any of these circumstances is not aided by the conviction, ib.
168. THE HOUR was not required by the common law; and it is sufficient to say, "about such an hour," 332. f. 87
169. If the hour and day are set forth against the principal, it is fatal to mention the day only against the accessory, ib.
170. The mistake of the hour will not be material upon the evidence, Page 332
171. THE DAY on which the fact was done must be set forth, 332. f. 88
172. If the fact were in the night, the count should alledge it *in nocte ejusdem diei*, 332
173. It is not sufficient to say, "about such a day," or "between such a day and another day;" but the very day must be set forth, ib.
174. So it is insufficient to alledge the fact on a feast day, as *St. John's*, without shewing whether it is *the Baptist or the Evangelist*, 333
175. So it is erroneous to set forth the fact on an impossible day, as 31. June or 30. February, ib.
176. And the day both of *the wound* and *the death* must be set forth, ib.
177. It must also be alledged that "he struck him *adtrunc et ibidem*" ib.
178. How a repugnancy in setting forth the day will vitiate either an indictment or appeal, ib.
179. A mistake of the day will not be material upon evidence, 333
180. If the allegation of the day be only *prima facie* uncertain, it may be helped by the apparent sense of the context, 334. f. 89
181. How the day on which a principal in the second degree abetted shall be alledged, ib.
182. In an appeal of death, the year in which the stroke was given, and that in which the death happened, must be set forth, 334. f. 90
183. But the king's reign, in which these facts happened, is sufficient, without shewing the year of Our Lord, ib.
184. And alledging the facts in such a year of such a king, is sufficient without saying that it was in such a year of his reign, ib.
185. The place where the death happened,

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- pened, as well as that where the hurt was given, must be shewed with precise certainty, and free from repugnancy, Page 335
186. A mistake of the place is not material upon *not guilty*, provided the fact be proved at some place within the county, ib.
187. In an appeal of death, some place both of the death and hurt, and in every other appeal some place where the fact was committed, must be alledged, 335. f. 92
188. It is safest to lay it in a town; but if done out of a town, it may be laid in any other place from whence a *visne* may come, 335. f. 92
189. A *visne* may come from any place where all the inhabitants, from the smallness of its environs, may be presumed to have some knowledge of the fact, &c. ib.
190. Therefore a *visne* may come from a town, ward, parish, hamlet, burgh, manor, castle, or even from a forest, or other place known out of a town, ib.
191. Where a *place* is generally alledged, the law will intend it to be a *vill*, unless the contrary appear, ib.
192. But if there be no such town, hamlet, or place, or the fact be done in some vill in a forest, and not mentioned, it may be pleaded in abatement, ib.
193. So if a fact done in a vill within a parish containing divers vills, be alledged generally in the parish; or if a fact done in a city containing divers parishes, be alledged generally in the city, it may be pleaded in abatement, ib.
194. But till the contrary be shewn, the place shall be intended to contain no more than one town or parish, from whence a *visne* may well come *de vicineto civitatis*, which includes a city whether it be within a county, or be a county of itself, 266
195. But *London*, from its size, cannot be intended a place from whence a *visne* may come, and it is usual to shew the ward and parish in which the fact was done in so large a city, Page 336
196. No *visne* can come from the Wealds of Suffex, 336. f. 93
197. But a *visne* may come from a park, ib.
198. And *quere* whether a *visne* may not come from the walk of a forest; it being alledged as the place where the fact was done, ib.
199. No *visne* can come from such place if it be alledged only as a liberty, ib.
200. No *visne* can come from the scite of a manor, ib.
201. An appellant must count against all though only some of the appellees appear, 337. f. 94
202. For if he have judgment in one appeal, he shall not afterwards have judgment against others, unless they are named therein, 337. f. 94.
203. But he may count against those who are named whenever they shall appear, 337
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205. By 2. Hen. 4. c. 7. if the verdict pass against the plaintiff he shall be nonsuited, ib.
206. But in a verdict for manslaughter on an appeal of murder, the appellant shall not be nonsuit, ib.
207. An appellant may be nonsuited, after special verdict on demurrer, ib.
208. OF ABATEMENT OF THE WRIT, *vide Abatement, Amendment*, 338. to 351
209. OF PLEAS IN BAR TO AN APPEAL, 351
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212. So in appeal by an heir, it may be pleaded that another person is heir, or that one of the defendants is the wife of the deceased, or that the plaintiff is illegitimate, 353
213. So in an appeal by brother and heir, it may be said that he hath an elder brother by the same father and mother, *ib.*
214. So also in an appeal of death it is a good bar, that the plaintiff hath slept his time, *ib.*
215. So in appeal of robbery, that the plaintiff is a *villain* to the defendant, *ib.*
216. So in appeal of rape by man and woman, that they were never married, *ib.*
217. So in felony, that the plaintiff is an idiot, or born deaf and dumb, *ib.*
218. So also it is a good plea in bar to any appeal that the plaintiff is attainted of treason or felony, so long as the attainder continues, *ib.*
219. A *retraxit*, or a nonsuit of a former, is a bar to all subsequent appeals of the same kind, 353. f. 131
220. A nonsuit after appearance is a peremptory bar, without having declared, 353
221. But the bare purchase of the writ, and delivering it of record to the sheriff, is no bar after nonsuit, *ib.*
222. And to make a nonsuit in appeal a good bar, it ought to be after an appearance in proper person of record, *ib.*
223. Q. if a *discontinuance* of one appeal is a good bar to any other, 353. f. 132
224. At any rate, the *discontinuance*, to make a good bar, must be after appearance, Page 353
225. If an appeal by a wife abate by her marriage, or an appeal by an heir abate by his death, there can be no other appeal, 354. f. 133
226. And *quere* if an appeal once determined cannot revive, *ib.*
227. Where there is a plaintiff not disabled to prosecute, he shall not be barred in a second appeal by an abatement of the first, *ib.*
228. One appeal is no bar to a subsequent appeal either against the same, or different persons not named in the first, if it be for a distinct offence, although it be committed by or against the same person and property, 355. f. 134
229. But this must be understood where it was impossible to charge the offender in the first appeal, *ib.*
230. For after an appellant has indulged his *revenge* in one appeal, the law will discourage any other which his own *honor* only makes necessary, 355
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235. And no release shall discharge a person attainted, without the king's pardon, *ib.*

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237. But a *nonsuit*, at the trial, upon any one issue, will bar the appellant against all the appellees to the suit, *ib.*
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243. And this extends to appeals for felonies by any subsequent *statutes*, 360
244. But no damages shall be given where the appellee is liable to another prosecution, 361 f. 142
245. An appellee acquitted upon erroneous process shall have damages, 362. f. 143
246. So also shall one who waives the benefit, or release, or his clergy, and is acquitted on taking trial, f. 144
247. And where an appellee is intitled to damages, he shall have judgment for them without any process, f. 145
248. To what courts this power of awarding damages upon appeals shall extend, f. 146
249. If a jury give too small damages to an appellee, the Court may increase them, Page 364. f. 147.
250. If there be several appellees, and all of them acquitted, the damages ought to be severally assessed as to every one of them, 365. f. 148
251. A monk or *feme covert* appealed without the *abbot* or husband, cannot have judgment for damages, f. 149
252. *Abettors* are in no case liable to render damages where the *appellant* himself is not liable, 366. f. 150
253. And unless the *appellant* be found by the jury to be insufficient, the *abettors* shall not be enquired of, f. 151
254. The abettors may traverse the jury's finding the appellant to be insufficient, or that they abetted him, &c. f. 152
255. If the appellant be found sufficient only as to *part* of the damages, judgment shall be given against the abettors for the whole, 367. f. 153
256. The appellee after his acquittal may sue for the damages by attorney, f. 154
257. He may take out an *original writ* and *count* for greater damages against the abettors than given by the jury, f. 155
258. Or he may make use of *judicial process* by distress, as given by the statute, f. 156
259. He need not shew the time and place of abetment till the abettors appear upon such process, which shewing supplies the omission of the jury in this respect, f. 157
260. The nonsuit of an appellee, either in an original writ or process against the abettors, whether before or after appearance, is no bar to a second writ or process, f. 158
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263. How far a coroner may receive a bill of appeal, 116. f. 117

264. By 1. Hen. 4. c. 14. appeals of things done out of the realm shall be tried by the constable and marshal, 17. f. 6.

265. The marshal cannot determine an appeal of death without the constable, 20

266. An error in the court of the constable and marshal can only be remedied by appeal to the king, 21. f. 11

267. By 5 Geo. 2. c. 19. the sessions on appeal may amend defects in form, 94. f. 34

268. In what cases the coroner may receive an appeal, 115. f. 38

APPEARANCE.

1. Appearance will cure a defect in a writ for want of 15 days between the *teste* and the return, 340. f. 102

2. If an *appeller* appear, his life shall be considered as in danger, notwithstanding any error in the process. because the error is cured by the appearance, 363. f. 143

3. An appearance to an insufficient addition cures the defect, 347. f. 125

4. But an appearance will not cure the want of an addition, or a bad addition, *ib.*

APPROVER.

1. An approver is an offender confessing himself guilty, and *appealing* or impeaching an accomplice in his guilt, 369. ch. 24

2. He is so called because he must *prove his appeal* in every point, to entitle

himself to a pardon of course,

Page 369. ch. 24

3. He must be *properly* indicted of treason or felony, and in prison; he must confess the indictment, and be sworn to reveal *all* the treasons and felonies he knows, before the coroner enters his appeal against his *accomplices* in the crime he is charged with, being at the time of the appeal within the realm, 370.

4. A peer of the realm cannot be an approver, f. 3

5. A person attainted or outlawed cannot approve, f. 4

6. Nor an idiot, or deaf and dumb person, or one *non compos*, nor an infant wanting discretion, f. 5

7. A person in holy orders cannot be an approver, f. 7

8. But *it seems* that a woman or an infant who possesses sufficient discretion, may approve, f. 6

9. None shall be admitted to approve, without first confessing the crime in the indictment, 371

10. *Quare* if one found guilty can be an approver, 371 f. 9.

11. The Court is not bound *of right* to admit any one to approve, *ib.*

12. No person indicted; unless for treason or felony, can be an approver, f. 10.

13. And he must be indicted, to enable the Court to give judgment against him if his appeal be false, f. 11

14. A person indicted and appealed for the same felony, shall not be admitted an approver.—Nor can a person appealed only, and not indicted, be an approver, f. 12

15. The appellee of an approver cannot become an approver himself, f. 13

16. No person can be approved; but of the very crime contained in the indictment, 372

17. But, being bound to disclose all the treasons and felonies he knows, his accusation of other crimes is a ground to

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19. But if no such persons exist, or are within the realm, or perhaps in the very county named in the appeal, the approver shall be hanged, ib.
20. A man may be admitted an approver before any justices who have power to assign a coroner, f. 16
21. As the king's bench, gaol-delivery, and justices in eyre ; but *quære* as to justices of *oyer and terminer*, ib.
22. Neither a court baron, nor justice of peace, nor any other special justices, can receive the appeal of an approver unless their commission extend to it, ib.
23. And *quære* if the lord high steward of England can receive such an appeal, 297
24. On the confession of an indictment of treason or felony, the Court may in their discretion either award execution, or respite the convict till he prove his appeal, 373. f. 17
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2. But a justice of peace being created a peer, whether temporal or spiritual, a knight, a judge, or a serjeant, will not take away his authority, *ib. f. 24*
3. By 5. Geo. 2. c. 18. no attorney, solicitor, or proctor, shall be a justice of peace for a county during his practice, *ib. f. 35*
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WHAT STATUTES MAY BE EXECUTED BY A JUSTICE OF THE PEACE.

1. Justices of the peace may, by virtue of their commission, execute all statutes whatsoever made for the preservation of *the peace*, *ib. f. 37*
2. But justices of the peace cannot execute a statute in the case of a new-created offence, unless authority be given to them for such purpose in express words, *67. f. 38*
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4. By 15. Car. 2. c. 8. a justice of the peace, if he be a commissioner, farmer, or sub-commissioner of excise, shall execute any statute relating to the excise, *ib. f. 40*
5. By 24. Geo. 2. c. 40. f. 22. a justice of the peace who is a brewer, inn-keeper, distiller, or seller of spirituous liquors, cannot execute any statute relating to spirituous liquors, *ib. f. 41*
6. By 26. Geo. 2. c. 13. a justice of the peace who is a victualler or maltster shall not execute any statute relating to

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2. By 9. Geo. 1. c. 7. f. 3. if a justice of the peace for a county dwell in any city or other precinct that is a county of itself, situate within the county for which he is appointed, he may grant warrants, take examinations, make orders, although such dwelling be out of the county, *ib. f. 45*
3. By 28. Geo. 3. c. 49. any justice acting for a county may act as such, in any place within a city, town, or precinct which is a county of itself, and situated within, or surrounded by, or adjoining to any such county; but they cannot intermeddle in any motion arising within such city, town, or precinct, *69. f. 46*
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peace, the acts of a county justice therein are void, *Page* 69. f. 48

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9. By 15. Geo. 2. c. 24. city justices may commit persons apprehended within their limits to the house of correction for the county in which such city or liberty is situated, if the inhabitants thereof contribute to the support of such house of correction, 70. f. 50

10. By 24. Geo. 2. c. 55. justices of peace for one county may indorse warrants issued by justices of the peace for another county, for the apprehending of felons who have escaped from the county where the offence was committed, and admit the party to bail when apprehended, if the offence be bailable, 70. f. 71

11. By 28. Geo. 3. c. 49. any justice of the peace acting for two or more adjoining counties may act for each county respectively, although the justice do not reside in the county, 71. f. 51

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1. Subsequent justices of the peace may proceed on indictments taken before their predecessors, 73. f. 54

2. Justices of peace cannot proceed on an indictment taken before a coroner, or justices of *oyer and terminer* and *gaol-delivery*, *ib.* f. 54

1. They may be named "*keepers of the peace*," although they are expressly commissioned by the name of "*justices of the peace*," *Page* 73. f. 55

2. The description of justices of the peace by the name of "*justices of our Lord the King to preserve the peace*, &c." is good, without saying "*the King's peace*," *ib.* f. 55

3. By 26. Geo. 2. c. 17. the acts of justices of the peace shall be good, though they are not therein described to be of the *quorum*, 74. f. 56

OF THE JUSTICES AUTHORITY IN FELONY.

1. Justices have herein no power unless their commission authorizes them to *bear and determine felonies*, which in general is given to those of the *quorum* only, and a *cartiorari* has been quashed because it only mentioned justices of the peace, without adding they were assigned to *bear and determine felonies*; *sed quere*, *ib.* f. 57

2. The clause in the commission, to hear and determine felonies, gives justices no jurisdiction over an offence which by statute is specially appointed to justices of *oyer and terminer*, 74

3. Justices of the peace have no power to take an indictment on 5. Eliz. c. 14. concerning forgery, 75

4. Nor on 2. & 3. Edw. 6. c. 24. concerning accessories in one county to felonies in another, *ib.* f. 58

5. Yet by force of 2. and 3. Phil. & M. c. 10. and as all felonies include breach of the peace, justices of the peace may take examinations for any kind of felony, and commit the offenders, &c. &c. *ib.*

6. But as the 2. & 3. Ph. & M. c. 10. and 1. & 2. Ph. & M. c. 13. direct justices to certify their examinations in homicide, they seldom proceed further

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ther in relation to any felonies, though within their commission, except only petty larcenies, *Page 75*

7. Justices of the peace in *England* may commit an offender against the Irish law for felony, in order to be sent to Ireland, the offence being committed there, *76. notis*

8. A justice of the peace cannot take a person from the custody of the king's bench and send him to the county gaol, but he may, by his warrant, charge him criminally where he is in custody, *ib.*

9. Two justices may take a recognizance for felony on the high seas, &c. &c. *ib.*

10. Justices may take an inquisition of murder if the body cannot be found, *ib.*

OF THE POWER OF JUSTICES IN TREASON, PRÆMUNIRE, AND MISPRISON.

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2. They may also take the examination of such offenders, and the information of witnesses, and bind them over, &c. pursuant to the statutes of Phil. & M. *ib.*

3. By 3. Hen. 5. c. 7. justices of the peace shall have power by the king's commission to enquire of false money, &c. *77. f. 60*

4. By 5. Eliz. c. 1. they may enquire of the offence of maintaining the pope's power, *ib. 61*

5. By 13. Edw. 1. c. 8. they may enquire of offences touching the supremacy, &c. *ib. 62*

OF THE POWER OF JUSTICES OF PEACE IN INFERIOR OFFENCES.

1. Justices of the peace are empowered to hear and determine all trespasses; which comprehends all inferior offences against the peace, *ib.*

2. By the common law justices of the peace have no jurisdiction over forgery or perjury: the reason of it, *Page 77*

3. Libels are indictable before justices of the peace, *ib. f. 64*

4. A person may be indicted before justices of the peace for being an extortioner or a night-walker, and haunter of bawdy-houses, *78*

5. Justices of peace have jurisdiction over all inferior crimes whether mentioned in their commission or not, as being against the peace, *ib.*

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1. Justices of the peace cannot, by the general rule of law, execute their office in their own case, *ib. f. 68*

2. By 16. Geo. 2. c. 18. Justices may act in matters relating to the relief, settlement, and maintenance of the poor; to passing and punishing of vagrants; to the highways, and to parochial assessments, although rated to the charges of the parish in which they act, *ib. 69*

3. But on an appeal against an order of removal those justices who are rated to the relief of the poor in either of the contending parishes have no right to vote by virtue of this statute, *79. f. 70*

HOW FAR JUSTICES OF THE PEACE ARE IMPOWERED TO ADMINISTER OATHS.

By 15. Geo. 3. c. 39. any justice of the peace may administer an oath under any statute whereby a penalty is directed to be levied, or a distress made, *ib. f. 71*

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1. It is actionable to call a justice, "rascal," "villain," "liar," or any other opprobrious name, while in the execution of his office, 80. f. 73
2. Justices of the peace are not punishable civilly for acts done by them in their judicial capacities; but if they abuse their authority, they may be punished *criminally* by information,
ib. 74
3. An information will not be granted against a justice for an act done by him judicially, though such act be illegal, if he acted fairly, and without corrupt motion, ib.
4. By 1. Jac. 1. c. 5. justices of peace shall have double costs in actions brought against them in which the plaintiff is nonsuited, &c. ib. f. 75
5. By 21. Jac. 1. c. 12. actions against justices of the peace must be laid in the proper county, 81. f. 76
6. By 24. Geo. 2. c. 44. no writ or process shall be sued out or served on a justice until notice thereof has been delivered to him at least one month before the same is sued out, in which notice the cause of action shall be stated, ib. 77
7. By 24. Geo. 2. c. 44. f. 2. the justice may tender amends within a month after such notice, ib. f. 78
8. By 24. Geo. 2. c. 44. f. 3. if the plaintiff, on the trial of such action, do not prove that he gave such notice, the justice shall have a verdict,
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9. By 24. Geo. 2. c. 44. f. 4. if the justice shall not have tendered amends, he may, on leave, pay money into court, Page 82. f. 79
10. By 24. Geo. 2. c. 44. f. 5. no evidence shall be received of any other cause of action than that which is contained in the notice, ib.
11. By 24. Geo. 2. c. 44. f. 6. no action shall be brought against any peace officer for any thing done under a justice's warrant, until a copy of such warrant has been demanded in writing and refused, ib. f. 80
12. By 24. Geo. 2. c. 44. f. 6. if after such copy any action is brought, the justice who signed the warrant must be made a defendant, and the jury, on producing and proving the warrant, shall give a verdict for the defendants, notwithstanding any defect of jurisdiction in the justice, 83
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15. All actions must be brought against a justice of the peace within six calendar months, ib.
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19. An action of *trespass* will not lie against a justice of the peace for making a warrant to distrain for the poor's rate, if the rate have not been appealed from,

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20. If a justice issue a warrant that is totally illegal, he is liable to an action of *false imprisonment*, though he did not act intentionally wrong,

ib. f. 85

HOW FAR JUSTICES OF PEACE MAY AWARD COSTS.

1. By 18. Geo. 3. c. 19. when a justice hears a complaint, on any warrant or summons issued, he may award costs to be paid by either party, as he shall think fit, to be levied by distress,

ib. f. 86

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85. f. 87

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See KING'S BENCH.

J U S T I F I C A T I O N.

*See JUSTICES OF PEACE. ARRESTS.
PLEADING.*

K.

K I N G.

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1. The king is the supreme magistrate of the kingdom, and *entrusted* with the

whole executive power of the law,

Page 1. f. 1.

2. No court can have any jurisdiction, unless it some way or other derive it from the king,

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3. The king cannot sit in judgment upon any indictment, because he is a party, and he has delegated all his power to his judges,

ib. f. 2

4. The king cannot alter the certain and established rules of court, or add to the jurisdiction of an ancient court,

ib.

5. The king's grant of a judicial office for life which has been usually granted at will, is void,

ib. f. 3

6. The king cannot grant even a *mere* spiritual jurisdiction. *Note in marg.*

7. The king cannot grant any new commission whatsoever that is not warranted by ancient precedents, however necessary or conducive to the public good,

3. f. 8

8. Before the *stat. of W'est.* he could not authorise persons to take care of rivers, and the fishing therein,

ib. f. 8

9. The king's demise does not determine commissions, &c. &c.

ib. f. 11

10. The king still continues the principal conservator of the peace; but he cannot take a recognizance of it,

51. f. 1

11. The king, by his commission, may authorise whom he pleases to execute an act of parliament,

66. f. 37

12. The king's lands, while they continue in his possession, are wholly out of the jurisdiction of the sheriff's torn, and of all such courts,

131. f. 26

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2. The king's bench is entrusted with the highest jurisdiction over all capital offences, misdemeanors, public breaches of the peace, oppressions of the subject, and all factions, controversies, debates, misgovernment, or other crime, manifestly against the public good, 9. f. 3
3. This court is empowered to find redress for every injury, 10
4. It is not necessary to shew a precedent for the remedial interposition of this court; for, being the *custos morum* of the realm, wherever it meets with an offence contrary to the first principles of common justice, and of dangerous public consequence, it will adapt a punishment proportioned to the enormity of the offence, *ib. f. 4*
5. It is in the discretion of the king's bench to inflict such fine and imprisonment, and even infamous punishment on offenders, as the nature of the crime requires, *ib. f. 5*
6. This court is not confined to make use of their own prison, but may commit to any prison in the kingdom, and no other court can bail a prisoner committed by this court, *ib.*
7. The king's bench may proceed on indictments found before any other courts, and removed into it by *certiorari*, as well as on indictments and informations originally commenced in it, &c. *ib. f. 6*
8. A statute which appoints that crimes of a certain denomination shall be tried before certain judges, does not exclude the jurisdiction of the king's bench without express negative words, *ib. f. 6*
9. Where a statute creates a *new offence*, and creates a new jurisdiction, prescribing a certain mode of proceeding for the punishment of it, it is questionable whether the king's bench has concurrent jurisdiction, 10. f. 6
10. A record removed into the king's bench cannot regularly be remanded after the Term; but the judges, to prevent a delay of justice, may refuse to receive it, &c. Page 11. f. 7
11. The king's bench may grant a *nisi prius*, as well in cases of treason and felony as in other cases; and in such case the transcript of the record only is sent down to trial, *ib.*
12. By 6. Hen. 8. c. 6: the king's bench may remand and send down, as well the bodies of all felons and murderers brought before them as their indictments, into the counties where the offence shall have been committed, and may command the justices to proceed in the trial thereof, as if the same had never been removed, *ib. f. 8*
13. This statute shall not extend to high treason, 12. f. 9
14. The king's bench is the highest court of common law, and hath power to reverse erroneous judgments of all inferior courts, and to punish all inferior magistrates, and all officers of justice for corrupt abuses of their authority, but not for mere mistakes, &c. *ib. f. 10*
15. The king's bench, being the supreme court of *oyer and terminer*, gaol-delivery, and *eyre*, suspends the power of all other courts of this kind in the county wherein it sits, during the time of its sitting, and renders all their proceedings void, *ib. f. 11*
16. But such justices may proceed upon indictments taken in a foreign county, and removed before them, or if taken before the Term; *sed quare*, if it is not safest to have a special commission for this purpose, 12. 26
17. By 25. Geo. 3. c. 18. the session of *oyer and terminer*, and gaol-delivery of *Newgate in Middlesex*, if begun before the effoin day of any Term shall not be suspended, &c. by the sitting of the king's bench on the commencement of any Term, 13. f. 12
18. By

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18. By 32. Geo. 3. c. 48. the same is enacted with respect to the *sessions* held at *Hick's Hall* in *Middlesex*;

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19. All process upon writs of appeal or indictments removed into the king's bench by *certiorari* ought to be made returnable *coram nobis ubicunque fuerimus*,

13. f. 14

20. All process upon bills of appeal of one in *custodia marceballi*, and upon indictments commenced in the king's bench, ought to be returnable *coram nobis apud Westmonasterium*,

13. 295, 296

21. Where the king's bench proceeds on an offence committed in the same county wherein it sits, the process may be made returnable immediately, *ib.*

22. Process on an offence removed into the king's bench by *certiorari* from a different county must have fifteen days between the *teste* and the return, *ib.*

23. Where proceedings are limited to judges of gaol-delivery and *oyer* and *terminer*, the court of king's bench has an implied jurisdiction,

14. *notis*. 258. f. 18

24. The justices of the king's bench are conservators of the peace throughout the realm, and supreme coroners over all *England*,

14. *notis*. 51

25. Where the sheriff or coroner may receive bills of appeal, the court of king's bench may *a fortiori* do the same,

14. *notis*. 38

26. This court during Term, and any judge of it during Vacation, may admit persons to bail for any crime whatsoever, except persons committed for contempts,

14. *notis*

27. Where the body of an offender attainted in the county is removed by *habeas corpus*, and the indictment by *certiorari* into the king's bench, the court may award execution to be done by the marshal, *ib.*

28. Where persons put in feigned bail so as not to be reached by 21. Jac. 1. this court may order the parties to be set on the pillory, *ib.*

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2. Rescous is, a stranger forcibly freeing another from an arrest, 260

3. A prison which it is felony to break, is such a prison as will make a stranger guilty of felony by rescuing a prisoner from, 266. f. 1

4. But where the prisoner is not capitally guilty in breaking prison, a stranger who rescues him shall be, in like manner, excused, *ib.* f. 2

5. A stranger is not guilty unless the prisoner actually goes out of the prison, 266. f. 3

6. The sheriff's return of a rescous is not a good ground to arraign the rescuer upon, unless he be also indicted, 267. f. 4

7. An indictment for rescous must specially set forth the nature and cause of the imprisonment and the circumstances of the fact in question, 267. f. 5

8. A rescuer of a prisoner who would not be capitally guilty if he had broken the prison may be punished for a high misprison, *ib.*

9. A stranger who knowingly rescues a person committed for and guilty of high treason, is in all cases guilty of high treason, *ib.* f. 7

10. Whoever rescues one imprisoned for felony cannot be arraigned for such offence as for felony, till the principal offender be first attainted, Page 267. f. 8

11. But he may be immediately proceeded against for a misprison only, 268

12. By 16. Geo. 2. c. 31. to assist a prisoner to escape, though no escape be actually made, in case such prisoner was convicted or attainted of high treason or any felony, except petty larceny, or lawfully detained for such crimes expressed in the warrant, he shall be transported for seven years, *ib.* f. 9

13. If such prisoner was in gaol for petty larceny, or for any debt or damages exceeding 100l. every person assisting his escape shall be guilty of a misdemeanor, *ib.*

14. To deliver *into* any gaol or prison, any visor, disguise, instrument, or arms, to facilitate an escape of any prisoner, attainted, convicted, or detained for treason, felony, or other crime, except petty larceny, is transportation for seven years, 269

15. The indictment must state, that the instruments were conveyed with a design to effectuate an escape, *ib.*

16. No indictment can be maintained on this act for contributing to the escape of a prisoner committed on *suspicion* only, *ib.*

17. To deliver into any gaol or prison any disguise or instruments to facilitate the escape of a prisoner confined for petty larceny or for debt, &c. above 100l. is a misdemeanor, *ib.* f. 12

18. To assist any prisoner to make his escape from the constable carrying him to gaol by virtue of a warrant for treason or felony (except petty larceny) expressed in the warrant, or from any ship or vessel for transportation, is felony and transportation for seven years, *ib.* f. 13

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19. All prosecution for any of the said offences must be commenced within one year after the offence committed,

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20. By 25. Geo. 2. c. 37. to rescue or attempt to rescue any person committed for murder, or any person convicted of murder going to or during execution, is felony without benefit of clergy,

ib. f. 16

21. By force to rescue or attempt to rescue, after execution, the dead body of any person convicted of murder, is transportation for seven years,

ib. f. 17

22. By 11. Geo. 2. c. 26. if five persons or more shall tumultuously assemble to rescue any offender against the 9. Geo. 2. c. 23. for the better apprehending smugglers, their aiders, &c. they shall be guilty of felony, and be transported seven years,

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23. By 9. Geo. 1. c. 22. forcibly to rescue any person in lawful custody for any of the offences in the *black act*, is death without clergy,

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1. No man can be obliged to do suit at the sheriff's torn in respect to lands, if he do not reside within the precinct,

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2. If a man have a house within two lectures, he shall do suit to that within the jurisdiction of which his bed-chamber shall lie,

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2. By 6. and 7. Will. 3. c. 17. a reward of 40l. is given to those who shall convict CLIPPERS OF THE COIN, 166. f. 25

3. By 15. Geo. 2. c. 28. a reward of 40l. is given to those who convict COUNTERFEITERS OF THE COIN, *ib.*

4. By 10. and 11. Will. 3. c. 23. a certificate exempting from parish and ward offices shall be given to those who convict any person of privately stealing to the value of 5s. in any shop, warehouse, &c. *ib. f. 26*

5. By 5. Ann. c. 31. those who convict any one of BURGLARY or HOUSE-BREAKING in the day-time, shall receive 40l. and also the certificate given by 10. and 11. Will. 3. 167. f. 27

6. By 9. Geo. 1. c. 22. a reward of 50l. is given for any injury received in apprehending any offender against the *black act*, &c. &c. *ib. f. 28*

7. By 8. Geo. 2. c. 16. if such offender shall be apprehended so as the hundred be thereby discharged, the person apprehending shall have 10l. 168. f. 29

8. By 10. Geo. 2. c. 32. the provisions of 9. Geo. 1. c. 22. are extended to the apprehending of destroyers of sea-banks,

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banks, cutters of hop-bines, firing collieries, &c. &c.

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9. By 14. Geo. 2. c. 6. a reward of 10l. is given to those who shall prosecute **SHREPP-STEALERS**, &c. &c. to conviction, 168. f. 30

10. By 16. Geo. 2. c. 15. &c. a reward of 20l. is given to those who shall prosecute to conviction such as **RETURN FROM TRANSPORTATION**, *ib.* f. 31

11. By 19 Geo. 2. c. 34. rewards are given to such as shall be wounded, &c. in apprehending **SMUGGLERS**, 169. f. 32

12. If two accomplices in **SMUGGLING** discover and convict two or more offenders, they shall receive 50l. for every offender, 170

13. By 6. Geo. 1. c. 23. a reward of 50l. is given to such as shall convict another of **THEFT-BOTE**, 171. f. 37

14. By 25. Geo. 3. c. 57. whoever shall apprehend a counterfeiter of **LOTTERY TICKETS**, &c. is entitled to a reward of 50l. 171. note in marg.

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2. If a robbery be committed in one county, and the goods carried into another, the offender may be indicted of the robbery in the first county, and of larceny in the second county, 313. f. 47

3. If one man carry another into a different county, and there rob him, the appeal must be in the county where the robbery was committed, *ib.*

4. *Quare*, if goods be taken in one county from a menace given in another county, in which county the offender shall be tried, *ib.* f. 47

5. Those who apprehend and convict a robber in the highways are intitled to a reward of 40l. &c. &c. 165, 166

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1. By *stat. West.* the sheriff shall take no inquest but by a jury of twelve men, who shall put *their seals* thereto,

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2. This act relates to such inquisitions only as are a foundation for imprisonment, and not to inquisitions for offences where the party cannot be apprehended,

146. (N) 7

3. If the jury consist of more than twelve, it is sufficient if twelve put their seals,

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1. A secretary of state is not a magistrate within the protection of 7. Jac. 1. c. 5. 21. Jac. 1. c. 12. and 24. Geo. 2. c. 44.

61. (N) 1

2. The 16. Car. 1. c. 10. does not authorise secretaries of state to commit,

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3. A secretary of state, as such, is no conservator of the peace; the office neither implies nor requires the authority of a magistrate; and the law of England knows of no such committing magistrate,

231. *notis*

4. But a secretary of state may lawfully commit persons for treasons and for other offences against the state,

231. f. 4. and note 1

5. All the cases in which commitments have been made by secretaries of state enumerated. See p. 186. 232 (N) 4

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1. Either master or servant may have an appeal for a robbery done to the servant,

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2. Servant is not a good addition of the state or degree of either man or woman,

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1. THE COURT of justices of the peace in Sessions is an assembly of two or

more such justices, whereof one is of the *quorum*, at a certain day and place before appointed, in order to *enquire, hear, and determine*, in pursuance of their commission, of any causes or matters therein contained, Page 86

2. This court, when legally convened, is a court of record, *ib.*

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1. By 12. Rich. 2. c. 10. the sessions shall be kept every quarter, 87. f. 1

2. By 2. Hen. 5. c. 4. the quarters in the first week after *Michaelmas, Epiphany, Easter,* and *St. Thomas*, or oftener, if need be, 87. f. 2

3. By 14. Hen. 6. c. 4. the sessions in the county of *Middlesex* shall only be held *twice* a-year; but they now hold four *general*, and four *general quarter* sessions in the year, *ib.* f. 3

4. By 33. Hen. 8. c. 10. the *Tuesday* after *Easter-week* is expounded to be in the week after *claujum Pasche*, *ib.* f. 4

5. If *Michaelmas* fall on a *Sunday* or *Monday* the *quarter sessions* should, in strictness, be held in the ensuing week, and not in the same week, *ib.* f. 5

6. But the *quarter sessions* are variously held in several counties, some at one day, some at another, *ib.* f. 5

B Y W H O M T H E S E S S I O N I S T O B E S U M M O N E D A N D A P P O I N T E D.

1. This court cannot be held by fewer than *two justices*, one of whom must be of the *quorum*, *ib.* f. 6

2. The *sheriff* is bound to return *proper juries* to this court, 88. f. 6

3. The *custos rotulorum* ought to bring to the sessions THE ROLLS of the peace, *ib.*

4. Any two justices may direct their precept, *tested* under their hands and seals, to the sheriff of the county, ordering him to summon THE SESSION, to return a GRAND JURY, and to give notice

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notice to all stewards, constables, bailiffs, &c. to attend, *Page 88. f. 7*

5. The *precept* to summon a session ought to bear *teste* fifteen days before the return, and to be delivered to the sheriff immediately, *ib. f. 8*

6. And this precept can only be *superfeded* by a writ of *superfedeas* out of chancery, *ib. f. 9*

7. The *custos rotulorum* alone cannot issue this precept, *ib. f. 10*

8. Where the business of the session does not require the attendance of a GRAND JURY or other officers, it may be convened without a *summons*, *ib. f. 11*

9. If a sufficient number of justices do not meet at the day-appointed, yet any two justices may, in the week after any of the holidays mentioned in the 2. Hen. 5. c. 4. meet and open the session, and adjourn it, and issue their precept to the sheriff, to summons the jurors and officers on the day to which it is adjourned, *ib. f. 12*

10. Where two sets of magistrates have a concurrent jurisdiction, and one set appoints a session, the jurisdiction of that set attaches so as to exclude the other set from appointing another session, *89. f. 13*

HOW THE SESSION SHALL BE ADJOURNED.

1. The court of session, when regularly opened, can only be continued by adjournment; and in the entry of such adjournment the time at which the original session commenced must appear, *ib. f. 14*

2. Instances in which matters transacted at session are erroneous for want of a proper entry of the adjournment, *ib. 14*

3. If a session be once dropped it cannot be renewed, *90. f. 14*

4. The same number of justices are required to *adjourn* as to *open* and hold a session, *ib.*

WHO ARE BOUND TO ATTEND THE SESSION.

1. The *sheriff* must attend to return the *precept*, and to take charge of the prisoners, *Page 90. f. 15*

2. The *constables of hundreds* must attend to make their presentments, *ib.*

3. The *bailiffs of franchises* ought to attend, *ib.*

4. The *jurors* who are summoned are bound to attend on pain of being amerced, *ib.*

5. The *keeper of the house of correction* must attend, *ib.*

6. And *justices of the peace* for the county ought to attend and give their assistance to *open* the session and administer justice, *ib. f. 16*

THE POWER OF THE SESSION OVER ITS OWN MEMBERS.

1. This court hath no authority to amerce any *justice of peace* for non-attendance, *ib. f. 17*

2. The court cannot commit a justice of the peace for a contempt of court, or for using actionable expressions to a fellow justice of the *quorum*, *ib.*

3. Nor can they bind him to good behaviour, *91. f. 17*

4. But if a justice of the peace give just cause to any person to demand *surety of the peace* against him, he may be compelled by any other justice to find such security, *ib.*

OF A GENERAL, SPECIAL, AND QUARTER SESSIONS.

1. A *general quarter sessions* is one of those sessions which are holden in the four quarters of the year, pursuant to the statute of 2. Hen. 5. c. 4. *ib. f. 18*

2. The *quarter sessions* are only a species of the general sessions, *ib.*

3. A *special sessions* is that which is holden on a special occasion for the execution of some particular branch of the justices authority, *ib.*

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WHO MAY PRACTISE AT SESSIONS.

1. By 22. Geo. 2. c. 46 no person shall act as a solicitor, attorn y, or agent at any general quarter sessions unless regularly admitted, pursuant to the 2. Geo. 2. c. 23, *Page 91. f. 19*
2. By 22. Geo. 2. c. 46. no attorney shall permit any person not so admitted to practise at sessions in his name, *ib. f. 20*
3. The bill of an attorney for business done at sessions may be taxed in the king's bench, *92. f. 21*
4. By 22. Geo. 2. c. 46. no clerk of the peace, or sheriff, or either of their deputies, shall practise at sessions, *92. f. 22*
5. In what manner the clerk of the peace is to be appointed, *ib. notes*

OF THE JURISDICTION OF THE SESSIONS.

1. The sessions may proceed by *presentment*, by *information*, and by *indictment*, *ib. f. 23*
2. The justices in sessions have authority by the commission of the peace to hear and determine on felonies and trespasses, *ib. f. 24*
3. If a statute, giving the sessions jurisdiction, be repealed between the first hearing and the final determination, it is an abolition of the authority of the sessions, *ib. f. 25*
4. Where an authority is given to two justices of the peace to do any act, the sessions have a concurrent jurisdiction, except an appeal be given therein to the sessions, *ib. f. 26*
5. If a statute direct a proceeding at a *special sessions*, an original order made at a *general quarter sessions* is bad, *93. f. 27*
6. The quarter sessions may proceed by *information* on 5. Eliz. c. 4. f. 39, *ib. f. 28*
7. If a statute authorize the sessions to "hear and determine," without saying by *information*, they must proceed by *indictment*, *ib.*

8. The sessions have no power to judge of the validity of a deed, *Page 93. f. 29*

9. The sessions have no jurisdiction over new-created offences which are not against the peace, unless the statute give them such jurisdiction in express terms, *ib. f. 30*

10. Instances given, *ib.*

11. The sessions are bound to make a direct and final judgment, and cannot refer the determination of any matter that comes before them to other persons, *ib. f. 31*

12. But the sessions may, by the consent of the parties, refer a thing to another to examine, and may report to the court to determine upon, *94. f. 31*

13. The sessions may, by the common law, proceed to outlawry on indictments found at sessions, *ib. f. 32*

14. By 21. Jac. 1. c. 4. the like process may be commenced and prosecuted at sessions, on any penal statute on which a common informer may proceed, as in an action of trespass *vi et armis* at the common law, *ib. f. 32*

15. The sessions cannot award an *attachment* for a contempt in not obeying its orders, but must proceed against the party by *indictment*, *ib.*

IN WHAT CASE THE SESSIONS MAY AMEND PROCEEDINGS.

By 5. Geo. 2. c. 19. the sessions, upon all appeals against judgments or orders, may cause any defect of form in such original judgments or orders to be amended, *ib. f. 34*

IN WHAT CASE THE SESSIONS MAY AWARD COSTS.

1. By 8. & 9. Will. 3. c. 30. f. 3. the quarter sessions may, on any appeal concerning *settlements*, award such costs and charges as they think reasonable to be paid by the party against whom the appeal is determined, *95. f. 35*

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2. By 8. & 9. Will. 3. c. 30. f. 6. the appeal may be heard at a general or quarter sessions, *Page 95. f. 36*

3. By 9. Geo. 1. c. 7. f. 9. the justices at the quarter sessions at which the appeal is determined, may award to the appellant parish, if the appeal is determined in favour of such parish, so much money as shall appear to be reasonable, to be paid by the respondents, &c. *ib. f. 37*

4. By 17. Geo. 2. c. 38. the sessions may order the party in whose favour an appeal against a poor's-rate is determined, reasonable costs, &c. *ib. f. 38*

5. By 13. Geo. 3. c. 78. f. 30. on appeal against any order made under the *highway act*, the sessions may award costs, *ib. f. 37*

6. By 13. Geo. 3. c. 78. on an appeal against any order made on the *turnpike act*, the sessions may award costs, *ib. f. 40*

7. By 18. Geo. 3. c. 19. f. 5. on appeal by *overseers* against *constables accounts*, the sessions may award costs, *ib. f. 41*

8. And if the party do not pay such costs as the sessions award, an indictment will lie for disobeying the order, *ib. f. 42*

9. A *warrant* lies to the sessions to allow costs and charges, as directed by the above statute, *ib. f. 43*

10. The sessions need not state in an order for costs and charges, the particular items of expence on which they are allowed, *ib. f. 44*

11. The sessions cannot order costs on the mere adjournment of an appeal, *ib. f. 45*

WHEN THE SESSIONS MAY MAKE ORDER RESPECTING THE COUNTY.

1. By 9. Geo. 3. c. 20. the sessions, on presentment by a grand jury of the state of the shire-hall, may order it to be repaired, &c. *ib. f. 46*

2. By 14. Geo. 3. c. 59. the sessions may once a year order the county gaol to

be cleaned, and better regulated *Page 98. f. 47*

3. By 14. Geo. 3. c. 59. the quarter sessions may order the several courts of justice in the county to be properly ventilated, the prisoners to be clothed, the cells to be made commodious, &c. *ib. f. 48*

4. By 14. Geo. 3. c. 59. f. 3. the sessions may order the expences respecting the county gaols, prisons, and courts of justice, to be levied by rates, &c. *ib. f. 49*

5. If a fine be imposed on a county which the sessions think illegal, they may order the treasurer to pay the expence of trying the question at law out of the county stock, *ib. f. 50*

6. The sessions also may order the treasurer of the county to pay the expence of litigating any question respecting the repair of highways, bridges, &c. *ib.*

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1. Every sheriff is a principal conservator of the peace within his county, and may award process of the peace, *52. f. 4*

2. The sheriff is bound to return proper juries to the sessions of the peace, *86. f. 7*

3. By *stat. West.* the sheriff shall have counter rolls with the coroner, and attend with him to take appeals, *115. 116*

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5. Justices of assize may punish sheriffs for letting persons to bail who are not bailable, 188. f. 8, 9
6. By 4. Edw. 3. c. 2. sheriffs shall not let to mainprize those who are indicted or taken before justices of the peace. *See* BAIL. 188, 189
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